

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

KULALANI, LTD., ET AL.,

Petitioners,

v.

LILLIAN HAGOPIAN COREY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WALTER R. SCHOETTLE

Attorney at law

(Counsel of Record for Petitioners KULALANI, LTD., THE
AUNA FOUNDATION, and
FLORENCE A. ELLIS)

HELEN B. RYAN, TRUSTEE, *pro se*

WILLIAMS S. ELLIS, JR., *pro se*

Suite 1012

1088 Bishop Street

P. O. Box 596

Honolulu, Hawaii 96809

Telephone: (808) 537-3514



QUESTIONS PRESENTED

1. Whether the "extrajudicial source" rule of *United States v. Grinnell Corp.* applies to a suggestion of disqualification of a United States judge, pursuant to 28 U.S.C. § 455(a)?
2. Whether ex parte communications and administrative proceedings in bankruptcy are an "extrajudicial source" based upon which the impartiality of a district judge sitting in bankruptcy might reasonably be questioned under 28 U.S.C. §§ 144, 455(a), or 455(b)(1)?
3. Whether a litigant in a contested case in bankruptcy proceedings is denied due process when the trial judge has received ex parte communications from an opposing party and in conjunction therewith has expressed his opinion of the merits of the case to the opposing party?



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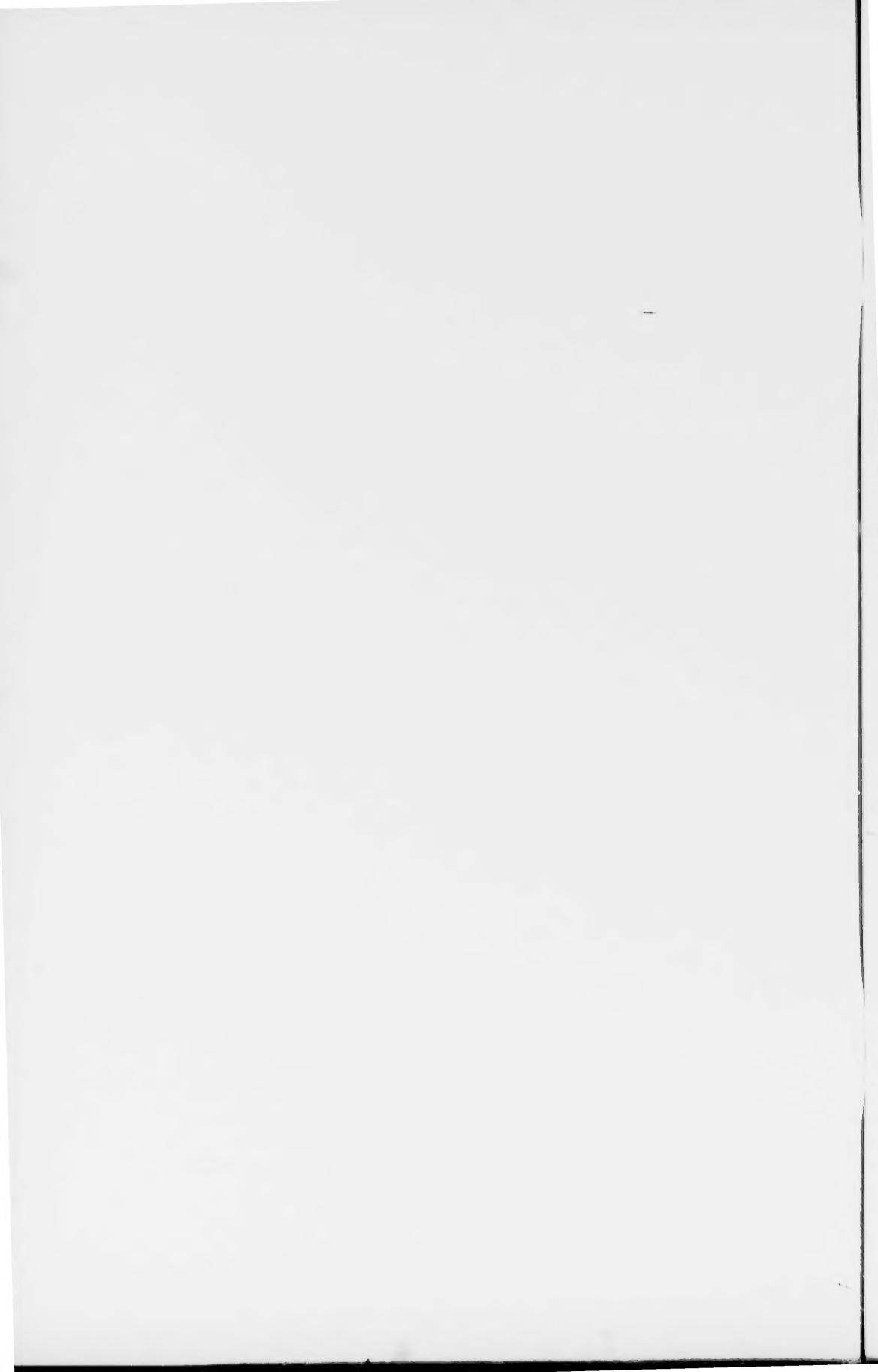


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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

KULALANI, LTD., THE AUNA FOUNDATION,¹
FLORENCE A. ELLIS, HELEN B. RYAN, Trustee
for the Estate of William S. Ellis, Jr., Debtor,
and WILLIAM S. ELLIS, JR.,

Petitioners,

v.

LILLIAN HAGOPIAN COREY, HERBERT H.K. LOUI
and ALBERTA K.A. LOUI,

Respondents.

PETITION FOR WRIT OF CERTIORARI

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your Petitioners, KULALANI, LTD., THE AUNA FOUNDATION, FLORENCE A. ELLIS, HELEN B. RYAN, Trustee of the Estate of William S. Ellis, Jr., Debtor, and WILLIAM S. ELLIS, JR., individually, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS IN THE CASE

The opinion of the Ninth Circuit Court of Appeals sought to be reviewed was filed December 27, 1989,

¹ Neither Kulalani, Ltd., nor The Auna Foundation have any parent or subsidiary companies.

and is published in full as *In re Corey*, 892 F.2d 829. This opinion is reprinted in the Appendix at page 1. Another published opinion was rendered on a prior appeal on April 19, 1982, as *In re Ellis*, 674 F.2d 1238. That opinion is reprinted in the Appendix at page 32.

JURISDICTION

As noted above, the opinion of the Court of Appeals was filed on December 27, 1989. On January 10, 1990, Petitioners timely filed a Motion for Rehearing and Suggestion for Rehearing *En Banc*, pursuant to F.R.A.P., Rule 40. The motion for rehearing was denied by order filed on February 21, 1990. Appendix at page 181. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1). The petition is timely if mailed under post-mark dated on or before May 22, 1990, pursuant to Revised Rules of the Supreme Court, Rules 13.4 and 29.2.

STATUTES INVOLVED

28 U.S.C.S. § 455(a) provides:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C.S. §455(b)(1) provides:

He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

28 U.S.C.S §144 provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel stating that it is made in good faith.

STATEMENT OF THE CASE

These consolidated cases are all bankruptcy proceedings. Bk. No. 70-249 and Bk. No. 72-391 are Chapter XII Real Property Arrangement proceedings filed pursuant to the Bankruptcy Act of 1898. Bk. No. 84-00371 is a Reorganization filed pursuant to Title 11 U.S.C. Chapter 11.

The dispute arises from a real estate transaction, dated March 1, 1971, involving William S. Ellis, Jr. ("ELLIS"), Bessie Hagopian and various unsecured creditors of ELLIS. The transaction took place pursuant to a Chapter XII real property arrangement approved by the Hon. C. Nils Tavares, U.S. District Judge sitting in bankruptcy, in *In re Ellis*, Bk. No. 70-249. The transaction consisted of: (1) a deed from ELLIS to Hagopian subject to a lease in favor of Silversword Corporation, a closely held ELLIS family cor-

poration, and further subject to a repurchase option in favor of ELLIS, given in consideration of the payment by Hagopian of \$85,500; (2) the repurchase option and consent to pledge given by Hagopian to ELLIS; and (3) a pledge of the option by ELLIS to a trustee for the benefit of his unsecured creditors. A restaurant and lodge was being operated on the subject property under the name "Silversword Inn," which name has also been frequently used in reference to the real property.

Petitioners herein KULALANI, LTD., THE AUNA FOUNDATION, and Florence A. ELLIS are successors to the interest of ELLIS and other claimants to the subject property. Petitioner Helen B. RYAN is the trustee for ELLIS in a subsequent Chapter XII bankruptcy proceeding. *In re Ellis*, Bk. No. 72-391. Respondent Lillian Hagopian COREY is Bessie Hagopian's sister. COREY was the person who personally dealt with ELLIS in the March, 1971, transaction, purportedly as agent for Hagopian. On April 2, 1974, Hagopian deeded the property to COREY, subject to the lease and option.

The term of the option was extended several times through December 31, 1976. COREY refused to extend the option further; and, without first obtaining possession from ELLIS, she entered into a contract to sell the property to Herbert and Alberta LOUI. ELLIS claimed that the 1971 transaction was a mortgage under Hawaii law, entitling him to redeem the property even though the stated term of the option had not been further extended.

The LOUIS sued COREY in state court and obtained a decree awarding specific performance. When the LOUIS were unable to obtain possession from ELLIS, they sought a writ of assistance from the Hon. Samuel King, sitting in bankruptcy in ELLIS' subsequent

Chapter XII proceeding. Adv. Pro. No. 72-391(3) & (4). Judge King determined that the LOUIS were the owners of the property and issued the writ on motion for summary judgment.

The issue eventually reached the U.S. Court of Appeals for the Ninth Circuit. *In re Ellis*, 674 F.2d 1238 (9th Cir. 1982); App. p. 32. The Court of Appeals held that the nature of the transaction had not been decided in the prior state court litigation between COREY and the LOUIS. *Id.* at 1250; 58. Further, the Court of Appeals held that Judge King should have conducted a hearing to determine (1) the intent of the parties at the time of the transaction and (2) the understanding of Judge Tavares as to the nature of the transaction. *Id.*, at 1247-48; 57

On remand, however, the LOUIS chose not to proceed with a hearing as suggested by the Court of Appeals. Instead, they returned to state court and obtained a money judgment against COREY because of her delay in delivering possession of the property to them.

Faced with a judgment in excess of three-quarters of a million dollars, COREY sought to amend her pleadings in Adv. Nos. 72-391(3) & (4) to allege that ELLIS was a mere lessee. RYAN moved to dismiss on the grounds that the LOUIS were no longer seeking possession. COREY's motion was denied and RYAN's was granted by order of Hon. Martin Pence, U.S. District Judge sitting in bankruptcy, entered on August 24, 1984, in Adv. Nos. 72-391(3) & (4). App. p. 63. Thus, litigation on the title issue was seemingly ended with Petitioners remaining in possession.

Meanwhile, COREY filed her own Chapter 11 bankruptcy petition. Bk. No. 84-00371. On September 6, 1985, she filed a complaint in an adversary proceeding.

Adv. No. 85-0185. In Count I she sought an "adjudication" of her interest in the property in conjunction with an attempted collateral attack on the validity of the LOUIS' state court judgment. In Count II she challenged the LOUIS' judgment as a preference. In Count III, she sought to foreclose her "mortgage" on the subject property. And in Count IV she sought indemnification from the LOUIS for damage claims against her by Petitioners.

The complaint alleged that Petitioners claimed an interest in the subject property, but COREY did not deny the validity of their claims. She did not seek possession of the property.

On October 9 and 10, 1985, Petitioners answered and demanded jury trial.

On October 1, 1985, Judge Robert Coyle made an interlocutory finding that the LOUIS judgment was valid, and cited circumstances under which a state court judgment may be collaterally attacked in bankruptcy court.

On November 1, 1985, COREY filed her first amended complaint. Minor technical changes were made in an attempt to bring the collateral attack on the LOUIS' judgment into the exceptions outlined by Judge Coyle. The amended complaint still did not deny the validity of Petitioners' claim to the property or seek possession.

On September 15, 1986, Judge Pence dismissed Counts I and IV of the adversary complaint, and imposed Rule 11 sanctions against COREY's attorney, James N. Duca.

On July 21, 1987, COREY filed a motion to amend her adversary complaint a second time. In the proposed second amended complaint, COREY sought to add claims against Petitioners for fraud, misrepresenta-

tion, and undue influence. She also sought to raise estoppel as a defense to Petitioners' claim to the Inn. The proposed second amended complaint denied the validity of Petitioners' claims in the property and sought possession.

At a hearing on October 27, 1987, Judge Pence denied COREY's motion to amend her complaint in this manner. App. pp. 68-74. Judge Pence unequivocally ruled as follows:

"It appears to me from the record here that Mrs. Corey wants to relitigate the same problems that have been under litigation for 15 years, . . ." App. p. 71.

"All of the allegations which she now brings certainly were known to her back in 1985, at the time of the filing of the original complaint and the first amended complaint.

"And she knew or should have known about the misconduct of Mr. Ellis long before October -- or, pardon me, July 1987.

"At the time of her first amended complaint she should have known all about the conduct of Mr. Ellis, having been associated with this litigation and with his activities therein since 1972.

"And as the Court has reviewed it, it sees that she wishes to inject new issues into this case, not [now] quoting, in the hope of achieving a different result regarding her ownership rights in the Silversword Inn." *Id.*, pp. 73-74.

"I refuse to allow this case to be delayed any more by filing of any more amended complaints." *Id.*, p. 74.

Two months later, on December 31, 1987, the LOUIS filed a plan of reorganization that had been drafted by

COREY's attorney. The plan provided for the sale of the Silversword Inn "free and clear of interests of all persons claiming by, through or under William S. Ellis, Jr., or his estate,"² pursuant to 11 U.S.C. § 363. Before confirmation of the plan, on February 8, 1988, COREY filed a "Motion for Order Authorizing the Listing of Property for Sale and the Sale of Property Free and Clear of Liens and Other Interests." The motion provided:

"The sale shall be free and clear of all claims and interests of any entity other than the estate, in accordance with the terms of Section 363(f) of the Bankruptcy Code. The Debtor disputes in good faith the validity and enforceability of the claims and interests of all persons whose ownership, leasehold or mortgage interests in the property arose subsequent to April 2, 1974, the date on which the deed of the Silversword Inn to the Debtor was recorded with the Bureau of Conveyances of the State of Hawaii in Liber 9808 at Page 315, or whose claims or interests are contingent upon the right, title and interest of W.S. Ellis, Jr., or any of his successors-in-title."³

Petitioners opposed COREY's motion on the grounds that they owned the Inn and that the Court's prior

² In spite of the fact that whatever interest COREY or the LOUIS may have in the property was acquired from Hagopian and in turn from ELLIS, it is clear that the primary objective of the Plan was to extinguish the claims of Petitioners.

³ As noted above, COREY herself is a successor-in-title to ELLIS. Further, Petitioners' claims do not arise subsequent to April 2, 1974, since the deed from Hagopian to COREY specifically stated it was subject to the repurchase option in favor of ELLIS. Nevertheless, it is clear that this provision of the motion was intended to extinguish only Petitioners' claims to the property.

rulings precluded COREY's purported challenge to their claim of title.

In a complete turnaround from his decision of October 27, 1987, Judge Pence now decided that he was obliged by the decision in *In re Ellis*, to "make a fresh determination of the mortgage question." App. p. 76. In an order filed April 7, 1988, Judge Pence ruled as follows:

"The Court therefor vacates *sua sponte* the portion of its August 24, 1984 Order that dismissed adversary proceedings 72-391(3) and 72-391(4). (These adversary proceedings were the subject of appeal No. 81-4081 in *Matter of Ellis*. 674 F.2d at 1239). The Court sets a Hearing to Determine Property Interests in the Silversword Inn for June 8, 1988."

App. p. 77.

When COREY's counsel noted possible procedural problems with the Court's action, Judge Pence drafted and filed an "Order Clarifying Order Continuing Hearing, Etc.," App. p. 78, in which he set forth what he considered to be legal authority for his action.

A continuation of the hearing on confirmation of the Plan had been set for May 27, 1988. COREY filed *pro se* objections to the portion of the Plan calling for payment of the LOUIS' judgment. She sought a continuance to obtain additional counsel to assist her in that regard.

During the May 27 hearing Judge Pence ordered all parties except COREY and her counsel to leave the courtroom. When Petitioners were allowed back into the courtroom, Judge Pence announced that COREY had decided to retain Mr. Duca as her attorney and proceeded with the hearing. Thereafter, the Court confirmed the Plan. A transcript of the closed portion

of this hearing is set forth in the Appendix at page 211.

On June 8, 1988, Petitioners filed a Motion to Recuse the Honorable Martin Pence on the grounds that "he is biased and prejudiced against WILLIAM S. ELLIS, JR., and all related entities . . . and that the Hon. Martin Pence has prejudged the equities and interests herein and that he is unable to fairly and impartially act as a factfinder in said proceedings." App. p. 22. The motion was not accompanied by an affidavit, but was simply based on the "file and record herein." By order filed and entered June 14, 1988, Judge Pence denied the motion and cited counsel for KULALANI, *et al.*, pursuant to F.R.C.P., Rule 11, to show cause why he should not be sanctioned.

The Court ruled that an affidavit was essential under either 28 U.S.C. § 144 or 455. Further the Court ruled that a recusal motion based "on the file and record" was insufficient on its face, since grounds for recusal must arise from an "extrajudicial" source, citing *In re International Business Machines Corp.*, 618 F.2d 923 (2nd Cir. 1980); *United States v. Winston*, 613 F.2d 221 (9th Cir. 1980); and *United States v. Azhocar*, 581 F.2d 735 (9th Cir. 1978), cert. den. 440 U.S. 907. App. p. 23.

On August 19, 1988, ELLIS filed an *ex parte* suggestion of recusal, which was denied by oral decision of Judge Pence, rendered on August 24, 1988. App. 25. Judge Pence cited *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), and *Hansen v. C.I.R.*, 820 F.2d 1464 (9th Cir. 1987), as grounds for his ruling:

"[A]ny statements made by the judge based upon what has occurred before him in court, in other

words, are not grounds for his recusal. Any statements must come from extra judicial sources." App. p. 25.

Thereafter, in connection with their appeal from the order confirming the Plan, Petitioners obtained a transcript of the closed portion of the May 27, 1988, hearing. During that hearing the following colloquy between Judge Pence and COREY had occurred:

[THE COURT:] I know that it's painful always, anytime when anyone has to use their own funds to pay a bill so that it has been shown in the bankruptcy proceeding -- in your own bankruptcy proceeding it is shown that you have money, that you have property, that you have claims to property. The Silversword Inn." App. p. 214.

"MRS. COREY: But I don't own the Silversword Inn. . . .

[THE COURT:] And if the Silversword Inn is yours you're way ahead because than you will have additional assets on top of your stocks, your money market funds, your homes, and all the rest. You'll have a lot more money. You'll be worth a lot more.

"MRS. COREY: But I have to give all that you say to Loui.

"THE COURT: That's -- well, not all of that. You will if you don't own the Silversword Inn. Yeah." App. pp. 215-6.

"[THE COURT:] And I notice over this time that you've been before me, due to your association with Ellis, who is not a lawyer but who is a wheeler and dealer with a lot of legal ideas that you have, yourself, acquired a lot of knowledge

about law and legal obligations. Now if you have to go on welfare it'll be because of what you did when you thought that you owned the Silversword Inn. . . ." App. p. 218.

"[THE COURT:] And the reason, as you know and I know, you couldn't deliver the property was because Ellis had made a deal with you one way and you thought it meant that you owned the property, and he said, 'Oh, no.' That he had the right to buy it back, and the Court of Appeals held that that constituted sort of a mortgage so that it would -- document instead of a deed that you thought you were getting. This is all Ellis and his wheeling and dealing and you happen to be the sucker for it. I heard you say that you relied upon his advice and you see where his advice put you. It put you into the Court here today with me telling you that you're stuck. You're stuck for the \$700,000.00 because there's no appeal, no appeal whatsoever from that judgment of the State Court. Whether you claim they didn't have jurisdiction or they did have doesn't make any difference. That judgment is there and you're stuck on it. And you're going to have to pay it." App. pp. 218-9.

"THE COURT: Well, you're wiped out. So that's too bad.

"MRS. COREY: \$200.00 a day doesn't matter one way or the other because I won't have anything anyhow.

"THE COURT: Well, if you have the Silversword Inn, you do." App. pp. 222-3.

Based on the transcript of the May 27th hearing,

ELLIS renewed his suggestion of recusal, which was denied by an oral decision of the Court rendered on November 8, 1988. App. p. 27. In this decision, Judge Pence recited all of his prior judicial contacts with ELLIS, in an attempt to justify his characterization of ELLIS as a "wheeler and dealer," concluding,

"So long before May 27th, 1988, this Court was, through judicial proceedings, thoroughly familiar with the manner in which Ellis conducted his business dealings. The alleged bias and prejudice -- if there was one, but the alleged bias and prejudice could have arisen only out of judicial proceedings. The motion for recusal is denied." App. p. 31.

In the course of the appeal, Petitioners obtained, over opposition by the Court reporter and COREY's counsel, a transcript of another closed hearing, which had occurred even earlier, on September 2, 1987. That was a hearing on a motion by COREY's counsel to withdraw from the case.

A good deal of the discussion during the closed hearing concerned the Silversword Inn and Bill ELLIS, as follows:

"[MR. DUCA:] The only issue I think that is a wrinkle here is whether it is appropriate for me to withdraw from the entire case or whether I should continue with the prosecution of the claim to recover -- to enforce Mrs. Corey's rights in the Silversword Inn."

"As to that matter, I'm prepared to follow the instructions of the Court." App. p. 191.

"[MRS. COREY:] I haven't done anything wrong, really I haven't. I thought I bought a piece of

property at a bankruptcy sale. I paid for it. I thought I was the owner. Then I waited, waited seven years for Bill Ellis to take over. And he didn't take over." App. p. 192-3.

"And when I went to the office there of Carlsmith and Carlsmith, I told them, I called Aaron Chaney, who was the auctioneer, and I said, 'Aaron Chaney, don't I own Silversword Inn?'

"And he said, 'No.'

"I said, 'What do you mean I don't own it? I paid for it.'

"He said, 'Well, Bill went and had some sort of deal with the judge. And so you just don't own it.' Bill says I'm only a mortgagee." App. p. 193-4.

"Because I don't need Silversword Inn. I can't handle Silversword Inn. I bought that with the intention of helping Bill Ellis. And in two years' time, he was going to buy it back from me. And that was the intention.

"THE COURT: Mrs. Corey, as I listen to you, it's very clear to me that you have been hurt.

"MRS. COREY: Yes. I've been very badly hurt.

"THE COURT: Not by Mr. Duca. Not basically by anyone except Bill Ellis.

"MRS. COREY: Yes.

"THE COURT: You thought that you had a clean deal with Bill Ellis. But you found out too late that when it comes to real property, Bill Ellis, he weaves a pattern that no one else ever thinks about.

"MRS. COREY: I know." App. p. 195-6.

"[THE COURT:] Now, you yourself, because

perhaps you hadn't been properly advised, and largely perhaps because you had fallen into the web of Bill Ellis, you yourself were the one at the center of all of the troubles that you now face.

"Your intentions were the best in the world. You thought that you were doing right.

"You didn't have an attorney when you were dealing with Bill Ellis. You relied on Bill Ellis; wasn't that it?

"MRS. COREY: I thought that he --

"THE COURT: Yes, you thought so. But then you're not the first one to whom these tragedies have happened." App. p. 197.

"And Bill Ellis misled you and got you what you thought you had, an absolute right, an absolute deed.

"And the way Bill Ellis had drawn it, he said, oh, no, it's a mortgage, he doesn't have it. Do you remember?" App. p. 198.

"[MRS. COREY:] And I'm wondering maybe if Mr. Duca forecloses on the Silversword Inn, and if those other people wait, maybe we could hand over the Silversword Inn instead of the million dollars. Because by that time, the Silversword Inn may be worth a million dollars." App. 207-8.

All of the foregoing was "on the record" at the time of Petitioners' June 8, 1988, motion for recusal of Judge Pence. At the time of the motion, Petitioners knew that the closed hearings had occurred but did not know what had been said.

From June 15 through June 23, 1988, Judge Pence conducted a hearing on the "title issue." On June 24,

1988, he delivered his oral decision, in which he found that COREY was the "owner" of the property, and that Petitioners had no interest. App. p. 81. The written decision was filed on August 15, 1988. App. p. 133. Judgment was filed and entered on August 29, 1988. App. p. 183.

On July 20, 1988, COREY filed another adversary proceeding seeking an injunction and turnover order requiring Petitioners to deliver possession of the property to her. Adv. No. 88A-0091. On December 5, 1988, the injunction and turnover order was entered.

Petitioners timely filed appeals from the order confirming the plan (CA. No. 88-15350); the judgment on the "title issue" (CA. No. 88-15351); the injunction and turnover order (CA. No. 88-15778); and an order disallowing their claims (CA. No. 88-15595).

The Court of Appeals affirmed, based on the findings of fact by the trial court. With respect to the issue of recusal, the Court of Appeals held:

"Appellants make a broadside attack on the impartiality of Judge Pence sitting as a bankruptcy judge. We are unimpressed. A judge's comments aimed at facilitating orderly proceedings are not, in and of themselves, evidence of bias. See *Hansen v. Commissioner*, 820 F.2d 1464, 1467 (9th Cir. 1987). Moreover, judicial bias must arise from extrajudicial sources. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). In this case, the record shows clearly that, to the extent the learned district judge was inclined to rule against appellants, this was the product of his knowledge of the facts of the case gained during judicial proceedings, not of any extrajudicial

information." *In re Corey, supra*, 892 F.2d at 838-9.

Petitioners filed a timely motion for rehearing, which was denied by order of the Court of Appeals, filed February 21, 1990. App. p. 181.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to resolve conflicts in principle among the lower courts.

In *United States v. Grinnell Corp.* this Court stated:

"The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp., supra*, 384 U.S. at 583.

This is the so-called "extrajudicial source" rule that courts apply to questions of recusal. *Grinnell* was decided in 1966, prior to substantial amendment of § 455 in 1974. Therefore, it is appropriate for this court to decide whether and to what extent the rule applies to the amended statute. See Note, "Disqualification of Federal Judges for Bias or Prejudice," 46 U.Chi.L.Rev. 236, 252-257 (1978).

In the 24 years since *Grinnell* was decided, the lower courts have struggled with this question, reaching various conclusions at different times and in different circuits. At one time, the *Grinnell* rule was almost universally applied to § 455(a). Indeed, the rule had been *expanded*, as in the instant case, to preclude consideration of anything a judge has learned or done

during the judicial proceedings before him. *King v. United States*, 576 F.2d 432 (2nd Cir. 1978), cert. den. 439 U.S. 850; *In re International Business Machines Corp.*, *supra*, 618 F.2d at 929; *United States v. Winston*, *supra*; *United States v. Azhcar*, *supra*; *City of Cleveland v. Krupansky*, 619 F.2d 576, 578 (6th Cir. 1980), cert. den. 449 U.S. 834. Under this version of the rule, as in the instant case, a judge is virtually immune from challenge on the basis of anything he has said or done "on the record" in the case before him.

The Third Circuit applies the "extrajudicial source" rule, but uses a much more liberal definition of "extrajudicial." There:

"Extrajudicial bias' refers to a bias that is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings." *Johnson v. Trueblood*, 629 F.2d 287, 291 (3rd Cir. 1980), cert. den. 450 U.S. 999. [Emphasis added.]

Thus, presumably, inappropriate conduct of the judge during the judicial proceeding is "extrajudicial" and grounds for recusal in the Third Circuit.

The First Circuit has never adopted the "extrajudicial source" rule with respect to § 455(a). *United States v. Cepeda Penes*, 577 F.2d 754, 758 (1st Cir. 1978); *Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir. 1979); *United States v. Mirkin*, 649 F.2d 78, 81-82 (1st Cir. 1981); *United States v. Kelly*, 712 F.2d 884, 889-890 (1st Cir. 1983); See also *In re Cooper*, 821 F.2d 833, 838 (1st Cir. 1987); *United States v. Giorgi*, 840 F.2d 1022, 1035 (1st Cir. 1988). In *Cepeda Penes*, the court stated:

"We recognize that the newly amended recusal provision, 28 U.S.C. § 455(a), now permits

disqualification of judges even if alleged prejudice is a result of *judicially* acquired information, in contradistinction to the prior law that *required* a judge to hear a case unless he had developed preconceptions by means of *extrajudicial* sources." *United States v. Cepeda Penes, supra*, 577 F.2d at 758. [Emphasis in original.]

The Fourth Circuit flatly rejected the "extrajudicial source" rule in *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978). That case held that a U.S. district judge who had affirmed a state court prisoner's conviction, while a state supreme court justice, was disqualified in the prisoner's subsequent federal *habeas corpus* proceeding.

The Fifth Circuit has developed an "exception" to the rule "where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." *Davis v. Board of Commissioners of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975) cert. den. 525 U.S. 944. The Fifth Circuit developed this exception with respect to § 144 and applies it by analogy to § 455. Recently, other circuits have adopted the Fifth Circuit's exception with respect to § 455 cases. *In re M. Ibrahim Khan, P.C.*, 751 F.2d 162, 164 (6th Cir. 1984); *Davis v. C.I.R.*, 734 F.2d 1302, 1303 (8th Cir. 1984); *United States v. Page*, 828 F.2d 1476, 1481 (10th Cir. 1987); *Jaffe v. Grant*, 793 F.2d 1182, 1189 (11th Cir. 1986). Indeed, the exception to the rule has been mentioned by the Ninth Circuit, although it was not applied in the instant case. See *United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988).

The Seventh Circuit obstinately maintains its rule that denial of a suggestion of recusal under § 455(a) is

not appealable, even in light of this Court's opinion in *Liljeberg v. Health Services Acquisition Corp*, __ U.S. __, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). *Durhan v. Neopolitan*, 875 F.2d 91, 97 (7th Cir. 1989); *United States v. Sidener*, 876 F.2d 1334, 1336 (7th Cir. 1989).

This Court ought to grant certiorari, to resolve these conflicts among the lower courts over the applicability of the "extrajudicial source" rule to § 455(a).

II.

Certiorari should be granted to decide important questions of federal law which have not been, but should be, decided by this Court.

A fair and impartial factfinder is the foundation of our judicial system. *Groppi v. Wisconsin*, 400 U.S. 505, 509, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971). It is not only vitally important that the process be fair, it must have the appearance of fairness. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980); *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954); See also *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1912).

The appearance of impartiality is required to promote public confidence in the impartiality of the judicial process. *United States v. Balistrieri*, 779 F.2d 1191, 1204 (7th Cir. 1985). Contrary to the holding in *Balistrieri*, however, the appearance of justice serves a substantial interest of the parties, as well.

If the parties receive what they consider to be justice, i.e. a fair trial, they are much more likely to accept the result even though it may be unfavorable to

them. Providing a system that satisfies the *unsuccessful* litigant that his arguments and evidence have been fully and fairly considered will, thus, in the long run, reduce the total amount of litigation. The number of appeals, in particular, will be significantly reduced. This point was made by Justice Frankfurter:

"It takes time to avoid even the appearance of grievances. *But it is time well spent*, even though it is not easy to satisfy interested parties, and defeated litigants, no matter how fairly treated, do not always have the feeling that they have received justice." *N.L.R.B. v. Donnelly Garment Co.*, 330 U.S. 219, 237, 67 S.Ct. 756, 91 L.Ed. 854 (1946). [Emphasis added.]

In the instant case, Petitioners believe Judge Pence was prejudiced in the sense that he had irrevocably decided all material issues of fact well in advance of the hearing which began on June 15, 1988. As evidence of this, Petitioners cite Judge Pence's private statements to COREY and her attorney, on September 2, 1987: "As I listen to you, it's very clear to me that you have been hurt . . . by . . . Bill Ellis"; "You thought you had a clean deal with Bill Ellis"; "You hadn't been properly advised"; "You had fallen into the web of Bill Ellis"; "Your intention were the best in the world"; "You thought you were doing right"; "You didn't have an attorney when you were dealing with Bill Ellis"; "You relied on Bill Ellis; wasn't that it?"; "Bill Ellis misled you and got you what you thought you had, an absolute right, an absolute deed."

Thereafter, in public, on October 27, 1987, Judge Pence ruled that COREY could not raise these very issues in the adversary proceeding, where Petitioners had properly demanded a jury trial.

Then, on December 31, 1987, the LOUIS proposed a plan drafted by COREY's attorney, to sell the Inn pursuant to 11 U.S.C. 363, free and clear of Petitioners' claims. Next, *prior* to confirmation of the Plan, COREY moved to sell the Inn free and clear of Petitioner's interests.

In response to Petitioners' objections to the sale of their property, Judge Pence *sua sponte* reopened the title question. It was set for hearing with no notice to Petitioners that the issues of fraud, misrepresentation, estoppel, and undue influence would be considered by the court and ultimately ruled upon.

Prior to determining ownership of the Inn, on May 27, 1988, Judge Pence confirmed the Plan to sell the Inn. At that time he held another *ex parte* conference with COREY in which he repeatedly suggested to her that she would be better off if she owned the Inn, in order to convince her to retain her attorney and to drop her challenge to the validity of the LOUIS' judgment.

Judge Pence ruled that none of the foregoing facts provide grounds for a suggestion of recusal under either 28 U.S.C. § 144 or § 455, because they are part of the "file and record" of the case. Subsequently, Judge Pence cited this Court's opinion in *United States v. Grinnell Corp.*, in support of his ruling. The Court of Appeals ruled that "judicial bias must arise from extrajudicial sources," and held that any bias or prejudice was the result of Judge Pence's "knowledge of the facts of the case gained during judicial proceedings."

The foregoing rulings may be correct under a literal reading of *Grinnell*. All of the statements by Judge Pence on September 2, 1987, are "supported" on the record by the July 7, 1986, letter from Dr. Marvit.

App. p. 232. Petitioners do not believe this was the intended result when *Grinnell* was decided. This court should grant certiorari in this case to prevent the use of *Grinnell* as a shield for judicial misconduct, as in the instant case.

A. The *Grinnell* extrajudicial rule should not be applied to 28 U.S.C. § 455(a).

Considering the importance of the question, there are very few decisions of this Court on the subject of judicial recusal. In *Glasgow v. Moyer*, 225 U.S. 420, 32 S.Ct. 753, 56 L.Ed. 1147 (1912), this Court held that a petition for writ of *habeas corpus* was not a proper means to review a denial of a suggestion of recusal under § 21 of the Judicial Code.⁴ In *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 33 S.Ct. 1007, 57 L.Ed. 1379 (1912), this court held that *mandamus* was not a proper means to overturn a district judge's decision to recuse himself. However, the case does contain *dicta* stating that adverse rulings are not sufficient grounds for recusal, since they can be reviewed on appeal.

Berger v. United States, supra, is the first case in which this Court directly construed § 21 of the Judicial Code [28 U.S.C. § 144]. There, in an affidavit filed by one of the parties it was asserted, on information and belief, that the trial judge had made derogatory comments about German-Americans to a German-American defendant in another case. The trial judge disputed the truth of the allegation, filed a stenographic transcript of the incident in question, and refused to recuse himself.

The questions before the Supreme Court were

⁴ Section 21 of the Judicial Code [36 Stat. 1090, chap. 231, Comp. Stat. § 986, 4 Fed.Stat.Anno.2d ed. p. 832] is substantially the same as the present provision of 28 U.S.C. § 144.

whether the trial judge can rule on the sufficiency or truth of matters contained in an affidavit of recusal and whether the affidavit in question was sufficient to require recusal. It was argued that the purpose of requiring a statement of reasons by the affiant for his belief of bias or prejudice was to "submit the *reality* and sufficiency of the facts" to the trial judge. *Id.*, 255 U.S. at 33. The Court held that the trial judge could rule on the sufficiency but not the "reality." *Ibid.*

The affidavit in *Berger* was further challenged on the grounds that it was hearsay. The court held that the statute is concerned with the "belief" of the party, not the actual existence of bias or prejudice. Therefore, hearsay affidavits are entirely appropriate. The court held:

"We are of opinion, therefore, that an affidavit upon information and belief satisfies the section, and that, upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case. And in this there is no serious detriment to the administration of justice, nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside? And any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term." *Berger v. United States, supra*, 255 U.S. at 35.

"And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives a chance for the evil against which the sec-

tion is directed. The remedy by appeal is inadequate. It comes after the trial, and if prejudice exist, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient." *Id.*, 255 U.S. at 36.

In *N.L.R.B. v. Donnelly Garment Co., supra*, this Court affirmed an order by the Board recusing the examiner on the grounds of "the generous feeling that a party ought not to be put to trial before an examiner who, by reason of his prior rulings and findings, may not be capable of exercising impartiality." *Id.*, at p. 236. Justice Frankfurter noted in passing that the law does not *require* recusal when a judge has been reversed on appeal. Therefore, recusal was not *required* in the case at hand, nor was it erroneous.

In *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980), the Legislative Branch, Appropriation Act and the Executive Salary Cost-of-Living Adjustment Act were challenged as violative of the compensation clause of the U.S. Constitution. This Court held that the Justices of this Court were not disqualified pursuant to 28 U.S.C. § 455, in spite of their personal financial interest in the case, on the grounds of the Rule of Necessity.

Until this Court's recent decision in *Liljeberg v. Health Services Acquisition Corp., supra*, *Grinnell* was the only other decision by this Court interpreting the recusal statutes.

The need for guidance from this Court is demonstrated by the *en banc* decision of the Fifth Circuit in *Parrish v. Board of Commissioners of Alabama State*

Bar, 524 F.2d 98 (5th Cir. 1975) (en banc), *cert. den.* 425 U.S. 944. There were four concurring opinions and two dissenting opinions. The issue was whether the "bias-in-fact" or "appearance of bias" tests ought to be applied to § 144. Judge Gee, concurring, wrote:

"The proper interpretation of Section 144 is a vexed matter with which I have long struggled. The belief of the parties that they are receiving even-handed justice, the apparencty of justice to those not parties, the importance of both perceptions in maintaining the legitimacy of the judicial institution, the difficult decisions faced by a judge called upon to stand recused, and the practical implications of § 144 for the continued efficient functioning of the district courts in our circuit are some of the competing considerations. They are not easily harmonized, and, indeed, there may be no entirely satisfactory manner of implementing Section 144. And though I concur fully in the opinion of the court on the assumption that *United States v. Berger* 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921), remains good law, I feel obliged to express my doubt that it does or should. For, in my respectful view, *Berger* represents an outdated rule which has been made tolerable in present circumstances only by engraftment of dubious exceptions." *Parrish v. Board of Commissioners, supra*, 524 F.2d at 105, [Gee, concurring.]

Petitioners would respectfully disagree with Judge Gee and the Fifth Circuit Court on their interpretation of *Berger*. Petitioners believe that a careful reading of *Berger* not only allows the application of the "appearance of bias" test, but *requires* it. Judge Gee's comments are quoted, however, to illustrate the ex-

treme need for guidance from this Court to resolve these differences of opinion. A start was made with *Liljeberg*, but that opinion contains no discussion of *Grinnell* or *Berger*. The instant case will provide the Court that opportunity.

Of further note are the comments of Judge Noonan, concurring in *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989). The question presented there was whether Hawaii supreme court judges could fairly consider disciplinary proceedings against Partington for rendering ineffective assistance to his client after they had already reversed the client's conviction on those very same grounds. Judge Noonan observed as follows:

"In the federal practices mentioned and in the Hawaii case the judges at one point have made up their minds. In the most literal sense they are prejudiced judges: they have prejudged the case now before them. In the federal practices it was and is assumed that they can unmake their minds and consider the case afresh. Why should this assumption not be the case in Hawaii?

It may be assumed that a judge can "unmake" his mind when he has prejudged a case in a prior trial, where his duty required a decision. It should not be assumed that a judge can "unmake" his mind when he has prejudged a case where his duty required an open mind. Similarly, a party should not be precluded by judicial rule from attempting to show that, by virtue of his participation in prior judicial proceedings, the judge has irrevocably made up his mind.

"Sensibilities no doubt are changing on the question of judicial bias. In 1765 Blackstone could write: '... the law will not suppose a possibility of bias or favor in a judge, who is already sworn

to administer impartial justice, and whose authority greatly depends upon that presumption and idea.' 3 W. Blackstone, *Commentaries on the Laws of England* *361. While recusal on the basis of challenge by a litigant had existed in roman law, cannon law, and early English law, it had disappeared by Blackstone's time, *id.*, and was permitted in federal law only in 1911. Since that turning point there have been other signs that judicial disqualification may be looked at more sharply. For example, Judge Aldrich's decision in *Perfect Parts* was criticized by a student writer Note, 'Disqualification of Judges for Bias in the Federal Courts.' 79 *Harv.L.Rev.* 1435, 1451 (1966). In 1974 Congress enacted the statute requiring judges to disqualify themselves if a reasonable person could doubt their impartiality. 28 U.S.C. § 455(a). The practice of the Supreme Court in its first century in relation to circuit decisions now looks strange to us. It may be that the time will come when the participation of panel judges in en banc circuit hearings will appear an impermissible breach of impartiality. It may happen even that prior ruling on a matter will disqualify a judge from sitting on another case involving the same issue. But it is still generally recognized that it is difficult to lay down an absolute rule disqualifying a judge because he has ruled against a litigant in an earlier context. Note, *supra* at 14452. What due process requires is being worked out case by case." *Partington v. Gedan*, *supra*, 880 F.2d at 133-134 (Noonan, concurring.)

Thus, on one hand, society imposes a higher stan-

dard upon judges than it once did. Yet, as applied herein, the *Grinnell* rule would render trials a mere empty ritual. Literally applied, as in the instant case, the *Grinnell* rule permits judges to decide irrevocably the merits of a case, based upon exhibits to pretrial motions that are otherwise inadmissible hearsay, and *ex parte* communications with a litigant and her counsel.

B. The *Grinnell* rule as applied to the instant case denies Petitioners due process.

Judge Pence read Dr. Marvit's letter (App. p. 232) and decided the case. But Dr. Marvit's letter is hearsay within hearsay. Moreover, the purpose for the letter was to show that COREY was not competent to manage her own financial affairs.

Thus, while Petitioners may have had an opportunity to rebut the slanderous allegations of fraud, misrepresentation, and undue influence contained in the letter, there was no need to do so. Had the letter been offered into evidence at trial, it would have been inadmissible.

Any impartial judge would have ignored the irrelevant, immaterial allegations about ELLIS contained in the letter. A rule that would allow the factfinder to decide such important issues of fact on such "evidence" deprives Petitioners their right to due process.

In addition, the *ex parte* rendering of an advisory opinion on the merits gave COREY notice of the issues to be tried while Petitioners were led to believe the issues were limited to the intent of the parties and understanding of Judge Tavares.

Petitioners were denied due process. *Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed 1129 (1938); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623,

99 L.Ed. 942 (1954); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986).

C. The proposed new guidelines.

If this Court grants certiorari in this case, in place of the *Grinnell* rule, Petitioners would advocate a standard similar to that applied by Justice Kennedy in *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir. 1980), *cert. den.* 449 U.S. 1012, as follows:

"[W]hether or not given all the facts of the case there are reasonable grounds for finding that the judge could not try the case fairly, either because of the appearance or the fact of bias or prejudice. . . . [N]egative bias or prejudice . . . will disqualify only if it is an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes. It is an animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct, unless the attitude is somehow related also to a suspect or invidious motive such as racial bias or a dangerous link such as a financial interest, and only the slightest indication of the appearance or fact of bias or prejudice arising from these sources would be sufficient to disqualify." *United States v. Conforte*, *supra*, 624 F.2d at 881.

This standard would be applied to any evidence of partiality, no matter the source. It is essentially the same standard by which jurors are measured in *voir dire*. The law recognizes that jurors are human beings with all sorts of experiences and opinions. The kind of opinion that is disqualifying is one that cannot be

"entirely set aside when judging persons or causes." Thus, as in *Conforte* one can fairly judge a person with whom he does not wish to play bridge.

At the same time, jurors are expected to keep an open mind. They are instructed in every trial not to make up their minds on the issue to be tried until they have heard all of the evidence in the case. Judges should be held to the same standard. Bias or prejudice should not be tolerated, whatever the source.

Measured by this standard, Judge Pence was disqualified.

CONCLUSION

For the foregoing important reasons, Petitioners respectfully request this Court to issue a Writ of Certiorari to the Ninth Circuit Court of Appeals to review its opinion filed December 27, 1989, and published as *In re Corey*, 892 F.2d 829; App. p. 1.

Dated: Honolulu, Hawaii, May 22, 1990.

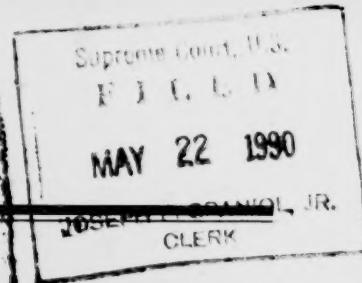
Respectfully submitted,

Walter R. Schoettle
(Counsel of Record)

Helen B. Ryan, Trustee

William S. Ellis, Jr.

89-1840



IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

KULALANI, LTD., ET AL.

Petitioners,

v.

LILLIAN HAGOPIAN COREY, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

APPENDIX

WALTER R. SCHOETTLE
Attorney at law
(Counsel of Record for Petitioners KULALANI, LTD., THE
AUNA FOUNDATION, and
FLORENCE A. ELLIS)

HELEN B. RYAN, TRUSTEE, *pro se*
WILLIAM S. ELLIS, JR., *pro se*

Suite 1012
1088 Bishop Street
P. O. Box 596
Honolulu, Hawaii 96809
Telephone: (808) 537-3514

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:

LILLIAN HAGOPIAN COREY,
Debtor.

HELEN B. RYAN, TRUSTEE;
KULALANI, LTD.; FLORENCE
A. ELLIS; AUNA FOUNDA-
TION; WILLIAM S. ELLIS, JR.,
Appellants.

v.

HERBERT H.K. LOUI; ALBER-
TA K.Y. LOUI; LILLIAN
HAGOPIAN COREY,
Appellees.

HELEN B. RYAN, TRUSTEE;
KULALANI LTD.; FLORENCE
A. ELLIS; AUNA FOUNDA-
TION; WILLIAM S. ELLIS, JR.,
Appellants.

v.

HERBERT H.K. LOUI; ALBER-
TA K.A. LOUI; LILLIAN
HAGOPIAN COREY,
Appellees.

No. 88-15350

D.C. No.

BK-84-0371 MP

No. 88-15351

D.C. No.

BK-84-0371 MP

WILLIAM S. ELLIS, JR.,
v.
LILLIAN HAGOPIAN COREY,
Appellee.

Appellant.

} No. 88-15595
D.C. No.
BK-84-0371

HELEN B. RYAN, TRUSTEE;
FLORENCE A. ELLIS; AUNA
FOUNDATION; WILLIAM S.
ELLIS, JR.,
v.
LILLIAN HAGOPIAN COREY,
Appellee.

Appellants.

} No. 88-15778
D.C. No.
CV-88-91 MP
OPINION

Appeal from the United States District Court
for the District of Hawaii
Martin Pence, Senior District Judge, Presiding

Argued and Submitted
November 1, 1989 -- Honolulu, Hawaii

Filed December 27, 1989

Before: Joseph T. Sneed, Alex Kozinski and
David R. Thompson, Circuit Judges

Opinion by Judge Kozinski

OPINION

KOZINSKI, Circuit Judge:

Who owns the Silversword Inn? This seemingly innocuous question has been litigated vigorously for nearly two decades in various bankruptcy proceedings and in the state courts of Hawaii. We resolve this and many other questions today and, in so doing, put an end to a dispute that has consumed a disproportionate share of our legal system's energy and resources.

I

The facts of this case, many of which are set forth in greater detail in our earlier opinion, *Ellis v. Corey (In re Ellis)*, 674 F.2d 1238 (9th Cir. 1982), are largely not in dispute. In March 1971, William Ellis, then a Chapter XII debtor under the Bankruptcy Act of 1898, conveyed two adjoining parcels on the island of Maui to Bessie Hagopian. Located on one parcel was the Silversword Inn.

Under the terms of the Ellis-Hagopian conveyance, Lillian Corey, Hagopian's sister, was to pay Ellis \$85,500. In return, Ellis was to transfer to Hagopian title to the parcels "free and clear of all encumbrances," but subject to two important exceptions. First, Hagopian agreed to be bound by existing lease agreements that permitted the Silversword Corporation, an entity controlled by Ellis, to occupy and operate the Inn. Second, Hagopian's title was subject to an exclusive option held by Ellis to repurchase the Inn. The option provided:

Now, therefore, the Purchaser, in consideration of the premises and of the foregoing conveyance to her, does hereby give to the Sellers an exclusive option for a period of two (2) years from the date

hereof, to purchase from the Purchaser all of the interest of the Purchaser in said Lot 2 described in said Deed for the sum of EIGHTY-FIVE THOUSAND & No/100 DOLLARS (\$85,000.00) plus five percent (5%) thereof per annum from the date hereof, and all of the interest of the Purchaser in said Lot 4 for the sum of ONE THOUSAND AND No/100 DOLLARS (\$1,000.00) plus five percent (5%) thereof per annum from the date hereof; PROVIDED, HOWEVER, that the foregoing option may not be exercised sooner than September 1, 1971;

Option, and Consent to Pledge and Assignment Thereof (Mar. 4, 1971) at 2.

In July 1973, Hagopian transferred her interest in the Silversword Inn to Lillian Corey. Ellis had previously assigned his option to purchase the Inn to Upland Investments, another entity he controls. With Corey's consent, Upland renewed the option twice, in 1973 and 1975 respectively, but never exercised it. The option expired by its own terms on December 31, 1976.

Believing that she owned the Silversword Inn outright upon the expiration of Upland's option, Corey signed a standard form Deposit Receipt, Offer and Acceptance (DROA) in January 1977, agreeing to convey the Inn to Herbert and Alberta Loui (the Louis) for \$575,000. When Ellis received notice of the impending sale, he expressed, for the first time, doubt as to the validity of the 1971 conveyance to Hagopian. On February 26, 1977, he wrote Corey the following letter:

This will let you know in writing that I do not concur with your signing [the DROA]. Nor do I concur with the use of [the chosen escrow company]. Whether or not I concur in other terms

would depend at least somewhat on how much of the net proceeds would come to Upland and on what schedule. . . . I also suggest that Upland be included as a Seller in any DROA. Otherwise, under the law of Hawaii, you might not be able to deliver clear title.

See Bankr. Nos. 84-0371, 72-391, and 70-249, Decision and Order (Aug. 12, 1988) at 36.

During the months that followed, Ellis tried to convince Corey that she did not in fact own the Silver-sword Inn. The court found that he used his friendship with Corey to gain her confidence in an attempt to confuse and deceive her as to the nature of the March 1971 transaction between Ellis and Hagopian. He told Corey that, under Hawaii law, many transactions that facially appear to be conveyances in fee simple are in fact mortgages. In particular, he cited *Kawauchi v. Tabata*, 49 Haw. 160, 413 P.2d 221 (1966), which held that a lender may never use an automatic defeasance provision in a mortgage agreement to defeat the mortgagor's right of redemption. According to *Kawauchi*, "[s]ince the right of redemption may not be waived, the form of the instruments cannot control the case if in reality the transaction was a mortgage." 413 P.2d at 227.

Ellis' plan was clear; he wanted to persuade Corey that the conveyance between himself and Hagopian was not a transfer in fee simple subject to an option, but only a mortgage, with equitable title to the Inn remaining in Ellis. This, he hoped would convince Corey not to go forward with the sale to the Louis, and would eventually enable him to claim the Inn on behalf of Upland. Ellis apparently was successful in blocking the sale, for on August 1, 1977, the scheduled closing date under the DROA, Corey refused to convey title to the

Inn.

Twelve days later, the Louis filed a complaint against Corey in Hawaii state court seeking specific performance and damages for breach of contract. Haw. Civil No. 52308. During the course of this action, Corey defended on the theory espoused by Ellis; that is, she claimed that the 1971 transaction between Ellis and Hagopian was in fact a mortgage, not a sale. As a result, Corey claimed she was unable to transfer title to the Inn because she was not the owner. The state court rejected Corey's defense and ordered her to proceed with the sale. This portion of the trial court's ruling was affirmed by Hawaii's Intermediate Court of Appeals. See *Loui v. Corey*, 2 Haw.App. 556, 634 P.2d 1055 (1981). The Hawaii courts, however, never resolved the mortgage issue and declined to determine the true nature of the 1971 transaction. See *In re Ellis*, 674 F.2d at 1249-50.

Concurrent with the state court proceedings, Ellis filed in his bankruptcy proceeding a "Complaint to Determine Lien" against Corey. Adv. Pro. No. 72-391(3). The complaint sought relief on the mortgage theory raised by Corey in defense of the Louis's state court action. Ellis, Corey and certain entities controlled by Ellis brought a similar action against the Louis. Adv Pro. No. 72-391(4). Following the Louis's successful intervention in No. 72-391(3), the court consolidated Nos. 72-391(3) and 72-391(4).

On September 12, 1980, the bankruptcy court issued a ruling that, as a matter of law, the March 1971 transaction between Ellis and Hagopian was a transfer in fee simple and not a mortgage. Ellis and his entities appealed this judgment, and we reversed. We held that the bankruptcy court improperly relied on the face of

the documents in the 1971 transaction without, as required by Hawaii law, examining the intent of the parties. *See In re Ellis*, 674 F.2d at 1247. We remanded for the bankruptcy court to make a "fresh determination of the mortgage question." *Id.* at 1250. Before the bankruptcy court could resolve the mortgage question, however, appellants moved to dismiss the adversary proceeding.

Meanwhile, the Louis returned to state court and, on April 24, 1984, obtained a judgment for \$757,000 in the form of "delay damages" for the rental value of the property from August 1, 1977, to April 30, 1983, attorney's fees and emotional distress. In response to this substantial judgment against her, Corey filed for protection under Chapter 11 to the 1978 Bankruptcy Code.

After unsuccessfully appealing the state court judgment to the Hawaii Supreme Court, Corey commenced an adversary proceeding, No. 85-0185, seeking to challenge the Louis's state court judgment and to establish her own rights to the Silversword Inn. On September 15, 1986, the district court sitting in bankruptcy,¹ granted summary judgment in favor of the Louis as to their state court judgment, but permitted Corey to go forward with her claim of ownership to the Inn. However, because the district court apparently believed that the dismissal of Adv Pro. Nos. 72-391(3) and 72-391(4) barred Corey from making a claim for title of

¹ The Honorable Martin Pence, Senior District Judge, presided over Corey's Chapter 11 proceedings because Hawaii's only bankruptcy judge recused himself. We treat an appeal from the decision of a district judge in a bankruptcy proceeding as an appeal from the final decision of a district court appealable under 28 U.S.C. §1291 (1982). *Klenske v. Goo (In re Manoa Fin. Co.)*, 781 F.2d 1370, 1372 (9th Cir. 1986) (per curiam), *cert. denied sub nom., Yamamoto v. Klenske*, 479 U.S. 1064 (1987).

the Inn in her own bankruptcy proceeding, the court sua sponte vacated the dismissal of those actions on April 7, 1988.

On February 29, 1988, the Louis filed a proposed Chapter 11 plan of reorganization of Corey's estate. Under the plan, Corey's creditors would be paid in full through a staged sale of her assets. Although the plan relied principally on the Silversword Inn's sale for the required funds, the court found that Corey had enough assets, even aside from the Inn, to pay her creditors' claims in full. The plan was approved on the basis of the Louis's votes in favor of confirmation. *See Order Confirming Plan Proposed by Loui Creditors* (June 24, 1988). Although Ellis, his controlled entities and Helen Ryan, Ellis's trustee in bankruptcy, opposed the plan, the court did not count their votes because it had previously estimated their claims against the Corey estate to be worthless.

The district court was more concerned about appellants' continuing claims that they were the sole owners of the Silversword Inn. On February 9, 1988, the court announced that it would conduct a hearing to resolve the mortgage question and determine ownership of the Inn. This would enable Corey to sell the Inn free and clear of any liens or other interests, and to resolve the Ellis-controlled entities' claims against Corey arising from their alleged ownership of the Inn.

Commencing on June 15, 1988, the district court conducted a five-day bench trial to determine the ownership of the Silversword Inn. At this time, the court also denied a number of the Ellis-controlled entities' pre-trial motions, including a request for a jury trial. Following the trial, the court found that: (1) in accordance with our decision in *In re Ellis*, it was required

to determine the "true substance" of the March 1971 transaction, based on the intent of the parties, Bankr. No. 70-249, Decision and Order (Aug. 12, 1988) at 2, 47-48; (2) the parties to the transaction intended it to be a conveyance in fee simple, not a mortgage, *id.* at 48-50; and (3) Ellis's actions were intended solely "to frustrate the efforts of both the Louis and, later Corey, to gain control of the Inn property," *id.* at 40-41. Therefore, the court concluded, Corey was "the sole owner of legal and beneficial title to the unencumbered fee simple interest" in the Silversword Inn. Bankr. Nos. 84-0371, 72-391 and 70-249, Judgment (Aug. 29, 1988) at 2. As a result, Ellis, Ryan and the Ellis-controlled entities, including the Auna Foundation, which claimed to be the current successor to Ellis's and Upland's chain of title, were held to have no interest in the property.

Finally, on November 30, 1988, the district court ordered the Ellis entities to relinquish possession of the Inn to Corey, pursuant to the turnover provisions of 11 U.S.C. §542 (1988). The court also enjoined Ellis and his controlled entities from interfering with any efforts by Corey to sell the Inn.

II

A. Confirmation of the Loui's Plan for Reorganization

1. Appellants contend that the Louis' plan for reorganization should have been deemed rejected because Ellis, Ryan and the Ellis-controlled entities, claiming in excess of one million dollars against the Corey estate, voted against the plan. Appellants' claims included unliquidated sums for "emotional distress," "paralegal services" and "lost rent" on the Silversword Inn. The Louis's claims against the

estate, by comparison, were approximately \$700,000. Thus if appellants' claims were valid, their votes against confirmation of the plan would have been sufficient to defeat it, *see* 11 U.S.C. §1126(a), 1129(a)(1988), or at least force the court to use the "cram down" provisions of 11 U.S.C. §1129(b)(1988).

The district court, however, did not consider appellants' votes because it had estimated their claims against the Corey estate to be zero. Under 11 U.S.C. §502(c)(1)(1988), a court shall estimate any contingent or unliquidated claims against the estate that "would unduly delay the administration of the case." Given the highly speculative nature of appellants' claims, the district court correctly found estimation to be appropriate. Otherwise, the confirmation of the Louis's plan would have been unduly delayed to the detriment of Corey and her real creditors.

A court has broad discretion when estimating the value of an unliquidated claim. *Addison v. Langston* (*In re Brints Cotton Mktg., Inc.*), 737 F.2d 1338, 1341 (5th Cir. 1984); *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 136 (3d Cir. 1982). Here, the court made factual findings regarding the value of appellants' claims. *See, e.g.*, Withdrawal and Vacating of Order Estimating Claim of William S. Ellis (Florence Ellis) (July 13, 1988). These estimates have since been confirmed in final adjudications. *See, e.g.*, Order Disallowing Claim of William S. Ellis, Jr. (Oct. 3, 1988). From our review of the record, it is clear that the district court did not abuse its discretion in making the estimates. Appellants were not Corey's creditors and had no right to object to the Louis's plan.

2. We also reject appellants' attempts to challenge the Louis's claims against the Corey estate. The

Louis's claim arise from the Hawaii court's decision in *Loui v. Corey*, Haw. Civil No. 52308. Appellants raise a number of objections to the state court's decision based on the Constitution and state and federal law. Appellants' claims thus represent a collateral attack upon the judgment of a state court. This attack is beyond the jurisdiction of federal courts to consider, even though it purports to raise constitutional issues. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983).; *Worldwide Church of God v. McNair*, 805 F.2d 888, 890-91 (9th Cir. 1986).

3. Appellants' claim that the state court improperly interfered with the federal courts' exclusive jurisdiction over bankruptcy proceedings is also without merit. The Hawaii judgment was against Corey who, throughout the state court proceedings, was not yet under the protection of federal bankruptcy laws. Thus, the judgment could not prejudice her rights as a Chapter 11 debtor. We also reject appellants' claim that the Hawaii judgment was an unlawful preference, because appellants have failed to show that Corey was insolvent or in danger of becoming insolvent at the time the judgment was recorded, see 11 U.S.C. §547(b)(1988) ("the trustee may avoid any transfer of an interest of the debtor in property . . . made while the debtor was insolvent").

The state court judgment also did not interfere with the Ellis bankruptcy proceedings, as the state court never purported to grant title to the Louis or affect Ellis's use or possession of the Silversword Inn. The judgment thus did not affect Ellis's rights as a debtor under the federal bankruptcy laws. Compare *Gonzales v. Parks*, 830 F.2d 1033, 1035-36 (9th Cir. 1987) (state

court was without jurisdiction to consider whether filing of bankruptcy petition constituted abuse of process).

4. Similarly unavailing is appellants' challenge to the Louis's plan on the grounds that it was not proposed in good faith as required by 11 U.S.C. §1129(a)(3) (1988). In order to satisfy the statutory requirement of good faith, a plan must be intended to achieve a result consistent with the objectives of the Bankruptcy Code. *Stolrow v. Stolrow's, Inc. (In re Stolrow's, Inc.)*, 84 Bankr. 167, 172 (Bankr. 9th Cir. 1988); *Jorgensen v. Federal Land Bank of Spokane (In re Jorgensen)*, 66 Bankr. 104, 108-09 (Bankr. 9th Cir. 1986). Granting the district court's findings substantial deference, we find no absence of good faith on the part of the Louis in proposing this plan. The Louis's plan appears to be a fair and well-reasoned effort to end the years of litigation surrounding the Corey and Ellis bankruptcies; it results in payment in full of all creditors with a substantial portion of the estate remaining in the debtor, an uncommon result in bankruptcy proceedings. The district court was well within its discretion in approving the plan.

B. Ownership of the Silversword Inn

Central to this dispute is the question of ownership of the Silversword Inn. Appellants raise a number of objections, both procedural and substantive, to the district court's findings that Corey owns the Inn. We address each of these in turn.

1. Appellants first challenge the district court's *sua sponte* order of April 7, 1988, vacating its earlier order dismissing adversary proceedings Nos. 72-391(3) and 732-391(4). They contend that Fed.R.Civ.P. 60(b), as made applicable by Bankr.R. 9024, prohibits a dis-

trict court from vacating an earlier decision on its own motion. They further argue that the dismissal of Nos. 72-391(3) and 72-391(4) bars Corey from litigating ownership of the Inn. Thus, appellants contend, because the earlier dismissal was improperly vacated, the district court's judgment finding Corey to be the owner of the Inn is equally invalid.

We need not reach the question of whether Rule 60(b) permits a court to vacate a prior judgment sua sponte. The record shows that the appellants voluntarily dismissed adversary proceedings Nos. 72-391(3) and 72-391(4) pursuant to Bankr.R. 7041 (incorporating Fed.R.Civ.P. 41). Because the dismissal order was silent as to whether it was with or without prejudice, it is presumed to be a dismissal without prejudice. *See Fed.R.Civ.P. 41(a)(2)*. The dismissal order therefore has no *res judicata* effect. *See Humphreys v. United States*, 272 F.2d 411, 412, (9th Cir. 1959) ("a suit dismissed without prejudice pursuant to Rule 41(a)(2) leaves the situation the same as if the suit had never been brought in the first place"); *see also Payne v. Panama Canal Co.*, 607 F.2d 155, 158 (5th Cir. 1979); *Greenlee v. Goodyear Tire & Rubber Co.*, 572 F.2d 273, 275-76 (10th Cir. 1978). It makes no difference, then, in the context of the appellants' argument, whether or not the bankruptcy court erred in vacating the earlier dismissal order.

2. Appellants also contend that Corey is judicially estopped from claiming that she is the owner of the Silversword Inn because she advanced the opposite position during the state court proceedings in *Loui v. Corey* and in the federal court proceedings in *In re Ellis*.

In *Stevens Tech. Services, Inc. v. SS Brooklyn*, 885 F.2d 584 (9th Cir. 1989), we recently described the

two competing views of judicial estoppel. Under the majority view, judicial estoppel does not apply unless the assertion inconsistent with the claim made in the subsequent litigation "was adopted in some manner by the court in the prior litigation." *Id.* at 588. Under the minority view, judicial estoppel can apply even when a party was unsuccessful in asserting its position in the prior judicial proceeding, "if the court determines that the alleged offending party engaged in 'fast and loose' behavior which undermined the integrity of the court." *Id.* at 589. Appellants' claim of judicial estoppel fails under either test. Neither the Hawaii courts nor the federal courts adopted Corey's position. Nor is there any indication that Corey is playing "fast and loose" with the judicial system. The district court found that Corey's change of position was occasioned by her realization that Ellis was not her friend and had duped her. This finding is not clearly erroneous. See *Konstantinidis v. Chen*, 626 F.2d 933, 939 (D.C. Cir. 1980) (doctrine of judicial estoppel "has never been applied where [the party's] assertions were based on fraud, inadvertence, or mistake") (quoting *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973)).

3. Appellants next argue it was improper for the district court to consolidate the Ellis and Corey bankruptcy proceedings. However, consolidation was within the discretion of the court, *see Bankr.R. 7042* (incorporating Fed.R.Civ.P. 42(a)); *A.J. Indus. v. United States Dist. Court*, 503 F.2d 384, 389 (9th Cir. 1974), and the consolidation was clearly in the interest of justice, as it helped bring the Corey and Ellis disputes to a long-overdue close. We therefore see no abuse of discretion.

4. Appellants contend that the district court erred in making findings of fraud, misrepresentation and estoppel not pleaded by Corey, as required by Bankr.R. 7009 (incorporating Fed.R.Civ.P. 9(b)). However, the court explained that its decision that Corey was the true owner of the Silversword Inn was not dependent on these findings; the court's decision rested on its interpretation of the 1971 transaction between Ellis and Hagopian as a sale rather than as a mortgage.

5. Appellant Auna Foundation argues that the court improperly denied it a jury trial on the issue of who owns the Inn.² In *Granfinanciera, S.A. v. Nordberg*, 109 S.Ct. 2782 (1989), the Supreme Court established the limits of the seventh amendment jury right in the context of bankruptcy proceedings. The Court held that the seventh amendment does not protect a creditor's right to jury trial in a bankruptcy proceeding when that creditor has made claims against the debtor's estate. *Id.* at 2799. The Auna Foundation, however, has not itself made a claim against Corey's bankruptcy estate; it merely opposes Corey's effort to establish title to the Inn. The Foundation therefore has not subjected itself to the court's equitable power to consider claims against the estate. *Id.* at 2799 n.14 (citing *Katchen v. Landy*, 382 U.S. 323, 335 (1966)). Thus, in order to determine whether the Foundation was entitled to a jury trial, we normally would be required to consider whether the district court's determination of

² Appellant Kulalani also appeals the court's denial of its request for a jury trial. However, by its own admission, Kulalani neither held title nor possession of the Silversword Inn at the time of trial. Thus, we see no basis for its participation as a party. Because Kulalani could not legitimately claim an interest in the Inn, there were no issues of fact for a jury to consider.

the title issue was legal or equitable in nature.

We need not handle this prickly issue³, however, because the Foundation was not, in any event, entitled to a jury trial as it is the controlled instrumentality of an entity that, under *Granfinanciera* itself was not entitled to a jury. The district court found that the Foundation is under the sole control of Ellis and members of his "immediate and controlled family." Bankr. Nos. 84-0371, 72-391 and 70-249, Decision and Order (Aug 12, 1988) at 40. The court also found that the transactions leading up to the Foundation's claim were carried out with the intent of clouding title to the Inn and frustrating the efforts of both the Louis and Corey to gain control of the Inn. *Id.* at 40-41. Finally, the record discloses that the Auna Foundation acquired title to the Inn long after notice of the trial had been circulated, barely a week before the scheduled trial date.⁴

³ Generally when a party not in possession seeks to establish title to land against one who is in possession, the action is characterized as one for ejectment, which is legal in nature. See *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016, 1018 n.3 (9th Cir. 1973); see also *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1462 n.15 (10th Cir. 1987). In this case, Corey, who is not in possession, is seeking to establish title against Ellis and his entities, who are in possession.

Unlike the typical action for ejectment, however, the trial to determine ownership of the Inn did not result directly in an order dispossessing Ellis of the Inn. It was not until three months after the judgment that Corey obtained possession of the Inn pursuant to 11 U.S.C. §542(a)(1988), which requires an entity in possession of the debtor's property to deliver that property to the debtor or the trustee. Because we hold that the Auna Foundation was not entitled to a jury trial as an instrumentality of Ellis, we need not express an opinion as to whether there is generally a right to jury trial under section 542.

⁴ We also note the unorthodox way in which the Auna Foundation became involved in this action. Rather than formally filing a claim of ownership of the Inn and moving to intervene in the

Because Ellis and a number of his other controlled entities have made substantial claims against Corey's estate, they would not themselves be entitled to a jury trial. They lacked the power to change that result by placing the Inn into the hands of a fully controlled instrumentality. We look beyond the form of the transaction and conclude that the Foundation was not entitled to a jury trial.⁵

6. Finally, we consider the merits of the district court's judgment on the mortgage question. Appellants contend that the district court incorrectly found the 1971 transaction between Ellis and Hagopian to be an outright sale, rather than a mortgage. As we held in *In re Ellis*, under Hawaii law, a deed absolute coupled with a repurchase option creates a mortgage when the parties so intend. 647 F.2d at 1247; see *Kawauchi v. Tabata*, 49 Haw. 160, 413 P.2d 221 (1966). These cases establish that the intent of the parties is the controlling factor in determining whether a transaction is a sale or a mortgage. See *In re Ellis*, 647 F.2d at

proceedings, the Foundation's lawyer, who is also counsel for a number of the other Ellis-controlled entities, added the Foundation's name to various motions filed a few days before the trial. The Foundation never obtained independent counsel, and its litigation posture was identical to that of other Ellis entities. Having failed to through the normal mechanics for joining as a party in an ongoing district court proceeding, the Foundation failed to establish an independent presence in the litigation.

⁵ We note, by way of analogy, that instrumentalities of foreign nations, which also are not protected by the seventh amendment are not entitled to jury trials. See *Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1534-35 (11th Cir.), cert. denied *sub nom.*, *Arango v. Compania Dominicana de Aviacion*, 474 U.S. 995 (1985); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 426 (5th Cir. 1982); *Rex v. Cia. Peruana De Vapores, S.A.*, 660 F.2d 61, 62-69 (3d Cir. 1981), cert. denied, 456 U.S. 926 (1982); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881-83 (4th Cir. 1981), cert. denied, 455 U.S. 982 (1982).

1247; *see also In re Estate of Damon*, 5 Haw.App. 304, 689 P.2d 204, 209 (1984) ("the intent of the parties is crucial in determining the nature of the transaction").

After a five-day trial, the district court determined that the parties to the March 1971 transactions had intended it to be an outright sale, subject merely to the repurchase option held by Ellis. Unlike the lender in *Kawauchi*, Corey and Hagopian never discussed with Ellis the prospect of making a loan and they paid a fair market price. These findings are not clearly erroneous, particularly since the intent of the parties, as found by the district court coincides with the face of the transaction.

Moreover, we seriously doubt whether the rule in *Kawauchi* applies to this case. The Hawaiian practice of construing certain conveyances in fee simple as mortgages is an equitable concept, designed to protect a mortgagor's right of redemption from overreaching lenders. *See Kahau v. Booth*, 10 Haw. 332, 334 (1896) ("Once a mortgage always a mortgage, and the mortgagor is allowed to redeem."). In this case, however, the district court found that any overreaching was done by Ellis, not Corey. According to the court, Ellis, "intended and attempted to use his secret knowledge and interpretation of *Kawauchi* to ensnare, entrap, and defraud an unsophisticated friend who meant only to help him." Decision and Order at 52.⁶ We do not

⁶ This case provides a textbook example of how equitable doctrines, developed by the courts in an effort to avoid fraud and oppression, can be manipulated to achieve fraud and oppression. In allowing the parties to undermine the finality of a facially unconditional transfer in *Kawauchi*, the Hawaii Supreme Court no doubt hoped to achieve a fairer result, consistent with the widespread notion that justice will be served if only parties are allowed to

believe the Hawaii Courts would apply an equitable doctrine to reach an inequitable result. *See Shinn v. Edwin Yee, Ltd.*, 57 Haw. 215, 553 P.2d 733, 744 (1976) (a party may not "profit by his own misconduct"); *Kawauchi*, 413 P.2d at 236 ("he who seeks equity must do equity") (internal quotations omitted). We hold therefore that the district court properly construed the March 1971 transaction as a sale.

C. Summary Judgment Requiring Appellants to Relinquish Possession of the Inn

Appellants argue that the bankruptcy court incorrectly held, as a matter of law, that they were required to relinquish possession of the Silversword Inn to Corey. However, under 11 U.S.C. §542(a) (1988), an entity in control of property that a trustee could use or sell pursuant to 11 U.S.C. §363 (1988), must turn that property over to the trustee. Appellants may be correct in arguing that, prior to relinquishing control of

explain their undocumented intentions and reservations.

What the court might have overlooked, however, is the unfairness that can flow from the necessity of litigating a claim such as Ellis's. When parties are allowed to undermine the finality of written instruments, every transaction can be held hostage to competing claims as to what might have been said or believed by any of the participants. Moreover, disregarding the plain language of a deed or contract may, as in this case, enable a party to enter the transaction with the intent "to ensnare, entrap, and defraud." In any event, litigating such claims, no matter how legitimate, is expensive, time-consuming an nerve-racking.

While holding parties to the words of their written instruments may result in an occasional unfairness, it certainly avoids the type of delay, unfairness and expense generated in this case. Suffice to say that, but for the *Kawauchi* rule, this case would have been over in 1982, or sooner. On balance, we believe that the far wiser, as well as fairer, rule is one which puts parties on notice that they will be bound by the terms of the instruments they sign. *See Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564, 569-70 (9th Cir. 1988).

the property, a creditor is entitled to some form of security; however, appellants do not in fact have any valid claims against Corey's estate, all such claims having been found worthless. Thus, they cannot claim that their rights as creditors have been prejudiced.

On the merits, we hold that the district court's grant of summary judgment was proper because there were no material issues of fact in dispute. Even if equitable defenses such as laches were available to defeat the operation of section 542, appellants have failed to show they would be entitled to any such defenses.

D. Validity of Injunction

Appellants argue that the court's order enjoining them from communicating with prospective buyers of the Silversword Inn violates their first amendment rights of speech and association. However, the injunction merely bars them from making false claims of ownership regarding the Inn; they are free to speak of anything else they please. Because the injunction only restrains false or misleading commercial speech, it is consistent with the first amendment. *See U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1042 (9th Cir. 1986).

E. Judicial Bias

Appellants make a broadside attack on the impartiality of Judge Pence sitting as a bankruptcy judge. We are unimpressed. A judge's comments aimed at facilitating orderly proceedings are not, in and of themselves, evidence of bias. *See Hansen v. Commissioner*, 820 F.2d 1464, 1467 (9th Cir. 1987). Moreover, judicial bias must arise from extrajudicial sources.

(1966). In this case, the record shows clearly that, to the extent the learned district judge was inclined to rule against appellants, this was the product of his knowledge of the facts of the case gained during judicial proceedings, not of any extrajudicial information.

F. Conclusion

Appellants make a variety of other arguments, too numerous and too insubstantial to discuss in any detail. Suffice it to say that we have studied the voluminous record in this case thoroughly and have given careful consideration to all of appellants' contentions. We find no error that would warrant reversal of the judgments below. The bankruptcy court did an admirable job with a difficult case. Doubtless, not everyone is satisfied with the result; perhaps no one is completely satisfied. Yet, there must be an end to every dispute so that the parties may go on with their lives unburdened by the demands and risks of litigation, and the court may turn its attention to other cases. After two decades of litigation, that point has been reached. This case is at an end.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re
LILLIAN HAGOPIAN COREY,
Debtor. } Bankruptcy No.
84-00371
(Chapter 11)

LILLIAN HAGOPIAN COREY,
Plaintiff, } ADV. NO. 85-0185
vs.
KULALANI, LTD., *et al.*,
Defendants-Appellants. }

FILED: June 14, 1988

ENTERED: June 14, 1988

DECISION ON MOTION TO RECUSE JUDGE MARTIN PENCE
AND ORDER TO SHOW CAUSE UNDER F.R.CIV.P. RULE 11

On June 8, 1988, attorney Walter R. Schoettle, on behalf of his clients Kulalani, Ltd., Upland Investments, Ltd., The Sword, Inc., Florence A. Ellis, and The Auna Foundation, filed a Motion "that the Hon. Martin Pence recuse himself from further proceedings relating to ownership interests in the Silversword Inn, on the grounds that he is biased and prejudiced against WILLIAM S. ELLIS, JR., and all related entities and entities claiming title to the Silversword Inn through William S. Ellis, Jr. and adversely to Bessie Hagopian and her successors in interest, and that the Hon. Martin Pence has prejudged the equities and interests herein and that he is unable to fairly and impartially act as a factfinder in said proceedings. This motion is based on the file and record herein."

The above motion does not state whether it is filed

under 28 U.S.C. § 144 or 28 U.S.C. § 455. If intended to be filed under § 144, the Motion is fatally flawed by its failure to file the affidavit required by that section. If intended to be filed under 28 U.S.C. § 455, there is absolutely nothing in the Motion to indicate any basis for anyone believing that this judge's "impartiality might reasonably be questioned." There is no showing of facts from which anyone could even remotely infer that this judge had, in any way, violated the proscribed conduct or status set forth in § 455(b). No memorandum of points and authorities were filed with the Motion. No statement of facts in support of the Motion was filed with the motion. All that is referred to is as set forth, viz., that the "motion is based on the file and record herein."

This court can draw but one conclusion: before counsel filed the Motion he made no study whatsoever of the law applicable to motions of recusal. It would appear that he never read either 28 U.S.C. § 144 or § 455, or the cases interpreting the same. Under 28 U.S.C. § 144¹, a party claiming bias must set forth in the required affidavit specific facts that form the basis for the belief, on the part of the party, that the court is biased. The affidavit must also positively show that the alleged bias stems from an extrajudicial source. The same requirements are held to be applicable to motions filed under 28 U.S.C. § 455².

The Ninth Circuit recognizes the rule that "the judge against whom a motion for recusal is filed may pass upon its legal sufficiency."³

¹ *In re International Business Machines Corporation*, 618 F.2d 923 (2d Cir. 1980).

² *United States v. Winston*, 615 F.2d 221 (9th Cir. 1980).

³ *United States v. Azbocar*, 531 F.2d 735, 739 (9th Cir. 1978), cert.

Since no affidavit has been filed setting out facts in support of the Motion, and since the Motion is based "on the file and record" in this case, movant has set out no extrajudicial source of any claimed bias or prejudice.

On its face, therefore, the Motion must be, and is DENIED, without hearing.

As indicated above, the Motion itself on its face is frivolous.⁴ Counsel is ordered to show cause on July 7, 1988, at 11:00 a.m. why sanctions should not be imposed against him for a violation of F.R.Civ.P. 11.

DATED: Honolulu, Hawaii, June 13, 1988.

/s/ Martin Pence
UNITED STATES DISTRICT
JUDGE

denied, 440 U.S. 907 (1979); *Arizona Past & Future Foundation v. Lewis*, 722 F.2d at 1423 (9th Cir. 1983).

⁴ *cf. Maier v. Orr*, 758 F.2d 1578, 1581 (U.S.C.A. Fed. Cir. 1985).

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re	BANKRUPTCY NO. 84-00371
LILLIAN HAGOPIAN COREY, <i>Debtor,</i>	
LILLIAN HAGOPIAN COREY, <i>Plaintiff,</i>	ADV. PRO. NO. 88-0091
vs. WILLIAM S. ELLIS, JR., <i>et al.,</i> <i>Defendants.</i>	

Hearing date: August 24, 1988

TRANSCRIPT OF ORAL DECISION DENYING ELLIS' EX
PARTE SUGGESTION OF RECUSAL, FILED AUGUST 19, 1988

THE COURT: Thank you. The first item to take up is Mr. Ellis' suggestion that I disqualify myself. As Mr. Ellis points out in his suggestion, he makes no affidavit. He simply quotes therein from my decision of recent date in this particular case some statements I made therein, the law is clear. Settled since 1966, even before that, in *U.S. versus Grinnell*, United States Supreme Court case and before that, *U.S. versus Berger* (phonetic), oh, that was many, many years ago, that any statements made by a judge based upon what has occurred before him in court, in other words, are not grounds for his recusal. Any statements must come from extra judicial sources.

Now, that same law has been applied in the Ninth Circuit, 1987 in *Hasbrouck versus Texaco*, 880 Fed Second, 1513 and *Hansen versus C.I.R.* in the Ninth

Circuit 820 Fed Second, 1464 and right in this own court -- did I say -- yeah in this own court, Judge King applied it in, *In Re Manoa Finance Company, Inc.*, and affirmed in 781 Fed Second, 1370.

This Court has had, this judge has had the same problem before me many, many times. The law is clear from the *Grinnell* and the *Berger* cases. The allegations of bias or prejudice must come from extra judicial sources. All the statements from which Mr. Ellis indicated in his suggestion that I recuse myself, came from judicial sources. The suggestion is denied.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re	BANKRUPTCY NO.
LILLIAN HAGOPIAN COREY, <i>Debtor,</i>	
LILLIAN HAGOPIAN COREY, <i>Plaintiff,</i>	ADV. PRO. NO.
vs.	85-0185
KULALANI, LTD., <i>et al.,</i> <i>Defendants,</i>	
In the Matter of	BANKRUPTCY NOS.
WILLIAM S. ELLIS, JR., <i>Debtor.</i>	
and	72-391(3) AND 72-391(4) (Consolidated)
HELEN B. RYAN, etc., <i>et al.</i> <i>Plaintiffs,</i>	
vs.	
LILLIAN H. COREY, <i>et al.,</i> <i>Defendants,</i>	
and	
HERBERT H.K. LOUI, <i>et ux.,</i> <i>Defendants,</i>	
vs.	
KULALANI, LTD., etc., <i>Additional Counter- claim Defendant.</i>	
In the Matter of	BANKRUPTCY NO.

WILLIAM S. ELLIS, JR.,
Debtor.

70-249

Hearing date: November 8, 1988

TRANSCRIPT OF ORAL DECISION DENYING ELLIS'
RENEWED EX PARTE SUGGESTION OF RECUSAL,
FILED NOVEMBER 4, 1988

THE COURT: This Court has before it a renewed ex parte suggestion of recusal by the Honorable Martin Pence filed by Mr. Ellis in this Court on November 4th, 1988.

In it he states that on May 27th, 1988 I said as follows in that case of bankruptcy, 84-0371, speaking to Mrs. Corey: She was a very intelligent woman -- and due to your association with her husband, who was a lawyer; due to your association with Ellis, who is not a lawyer, but who is a wheeler and dealer with a lot of legal ideas; and she, herself, has acquired a certain knowledge and so forth and then further on -- that this is all Ellis and his wheeling and dealing. In other words, what she had done regarding the -- her problems with the Louis' (ph) -- this is all Ellis and his wheeling and dealing and you have to be the sucker for it.

I heard you say that you relied on his advice and see where his advice has put you. It put you into Court here today with me telling you that you're stuck; that is, stuck to pay the Louis' \$700,000 and so on.

In the course of the ex parte motion by Mr. Ellis, he states on page three that he is not a party to adversary proceeding No. 85-0175 -- I think that's a 185 -- nor adversary proceeding No. 72-391(3) and (4) and that he has not appeared before Judge Pence in either of said

proceedings and then he puts the kicker -- except as an officer of certain defendants on the discovery motion.

Then he goes on and says the undersigned appeared as a party in the interest before Judge Pence in 84-371 on the first time in April 27, 28, '88 on the estimation of assigned claims.

Now, my statement as set forth in the moving papers was that on April and on May 27th, which was after Ellis had appeared before me on April of the same year in 1988 -- but I'll go ahead.

He said that -- says that neither he nor the debtor testified; that is, Corey testified or otherwise presented any evidence in the course of those proceedings to support the pretrial determination on May 27th, 1988 Mr. Ellis was a wheeler and dealer with a lot of legal ideas.

This is the second motion regarding my recusal. The first one I denied and as Mr. Ellis recognizes there are two sections involved, section 144 and section 455 of the United -- Title 28 United States Code. The law as set forth is always that the allegation of bias and prejudice must come from extrajudicial sources. Now, it doesn't make any difference whether it's 155 or whether it's -- I mean not 155; 455 -- or 144. It must be on something that is personal and arises out of extrajudicial sources.

Matters that appear before a Court and come out of the judicial process -- a judge does not sit as a zombie. He sits as any other person who draws conclusions from that which appears before him as a judge and if he draws those conclusions out of the judicial sources, they are not, whatever his conclusions might be, they are not a basis for his disqualification.

Upon reviewing the contacts which this Court has

had judicially with Mr. Ellis as the record of proceedings involving Mr. Ellis in this Court will show -- December 29th, 1972 Mr. Ellis filed a petition in bankruptcy under Chapter 12. That was bankruptcy 72-391. I was involved in that case in that on April 5, 1979, a consent order for auction sale of Lots 179, 181, 182 and January 5th, 1984 authorizing substitute appraisal of Lots 179 and 180 and March 2nd, 1984 sale of Lots 179 and 180, so I was involved in that and I had a chance to observe Mr. Ellis and his dealings with the properties involved in that bankruptcy and his dealings and the way in which he operated.

And then in October 24th, '79 Ellis filed an adversary proceeding in bankruptcy 72-321, known as adversary proceeding No. 72-391(3); that's Ellis, et al. versus Corey and I was involved in that. On July 11, 1980 there was a hearing to consider the motion to strike, motion to compel, and a pretrial conference and Ellis was present. On June 4th, 1982 an order remanded the case to me and on March 3rd, '83 involved in a pretrial order; on August 2nd, '83 another pretrial conference. September 13th, '83, January 5th, '84, February 7th, '84, May 4th, '84, July 23rd, '84; various pretrial orders -- all of these involved filings and this Court's familiarity with the way in which Mr. Ellis was operating his business and on August 1st, '84, hearing on motion for leave to amend answer.

Additionally on September 6th, '85, Corey filed an adversary proceeding naming as defendants among others William S. Ellis, Jr. and Kulalani, Limited, Upland Investments, Silversword Trust, The Sword, and so forth -- et al. That was adversary proceeding 85-0185.

I -- it clearly appeared in that as Mr. Ellis -- it says that he appeared as an officer of certain defendants. Well, those certain defendants were all of those corporations which it is as appeared then and appeared later, Ellis was the one who was operating -- actually the -- and managing; actually running, actually making the decisions for these successive corporations, all of them based upon, let us say, thin -- thin, and I'm usually [using] the word very, very lightly -- thin capitalization, et cetera.

Now, so this Court had familiarity with the way in which Mr. Ellis operated personally his business; and personally he operated all of these controlled corporations. Now, I handled numerous matters in that adversary proceedings prior to April of 1988. On July 14th at a hearing on a motion to dismiss; that's '86; September 15, '86, order granting motion to dismiss; May 14th, '87, hearing on motion to compel answers to interrogatories; October 20th, '87, motion for leave to file a second amended complaint, and Mr. Ellis personally was dismissed as the defense in adversary proceeding No. 85-085 in 1986.

So long before May 27th, 1988, this Court was, through judicial proceedings, thoroughly familiar with the manner in which Ellis conducted his business dealings. The alleged bias and prejudice -- if there was one, but the alleged bias and prejudice could have arisen only out of judicial proceedings. The motion for recusal is denied. Now call the next case.

* * *

In the matter of William S. ELLIS, Jr., Debtor.
William S. ELLIS, Jr., Silversword Trust, etc., by
Robert P. Shaw and Pauline L. Shaw, its Trustees,
Upland Investments, Ltd., etc., and the Sword Inc.,
etc., Plaintiffs-Appellees,

v.

Lillian H. COREY, Defendant-Appellant.

v.

Herbert H. K. LOUI and Alberta Loui, Defendants-
Appellees,

v.

KULALANI, LTD., etc., Additional Counterclaimant.
Defendant-Appellant.

Helen B. RYAN, Trustee in Bankruptcy for the Estate
of William S. Ellis., Jr., Debtor; Silversword Trust,
etc., by Robert P. Shaw and Pauline L. Shaw, et. al.,
Plaintiffs-Appellants.

v.

Lillian H. COREY, Defendant-Appellant.

v.

Herbert H. K. LOUI and Alberta K. A. Loui,
Defendants-Appellees.

v.

KULALANI, LTD., etc., Additional Counterclaimant,
Defendant-Appellant.

Lei-Anne E. GROUARD, Florence A. Ellis, Howard L.
Holmes and Pamela S. Holmes, Plaintiffs-Appellants.

v.

James PROTOTNICK, U.S. Marshal for the District of
Hawaii, Defendant-Appellee.
and

Herbert H. K. LOUI and Alberta Loui,
Intervenors/Defendants-Appellants.

Nos. 81-4081, 81-4213 and 81-4318.

United States Court of Appeals, Ninth Circuit

Argued and Submitted Oct. 22, 1981

Decided April 19, 1982.

Rehearings Denied May 27, 1982.

Appeals from the United States District Court for the District of Hawaii.

Before ALARCON, POOLE and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

These three consolidated appeals arise out of a complicated series of transactions in and out of court, over the last decade. William Ellis and parties roughly aligned with him in interest, in various combinations, appeal from three dispositions adverse to their claims to an improved parcel of land in Hawaii known as the Silversword Inn. The first judgment, entered by District Judge King in consolidated adversary proceedings Nos. 72-391(3) and 72-391(4) in a Chapter XII proceeding filed by Ellis in 1972, summarily declared that the defendants-appellees, Herbert and Alberta Loui, are the owners of the subject property and that the other parties to Bankruptcy Nos. 72-391(3) and 72-391(4) have no interest in it. Appeal No. 81-4081. For the reasons stated below, we reverse the judgment and remand the case for further proceedings. The second judgment, a writ of assistance issued by Judge King, directed the marshal to put the Louis in possession of the Silversword Inn as against "all and every person and entity holding possession of said premises." Appeal No. 81-4213. Since we reverse the judgment on

which this writ depends, it must be vacated. The third was the oral denial by District Judge Heen of a preliminary injunction sought by three persons not party to the bankruptcy proceedings, and not claiming title through William Ellis, but apparently aligned with him in interest, and apparently in possession of the property. These parties had filed a separate action in the district court seeking a declaration that the judgments issued by Judge King in the bankruptcy proceeding were of no effect as to their interest in and possession of the property. Although that action is still pending; the plaintiffs appeal from the oral denial of their request for a preliminary injunction against the U.S. Marshal. Appeal No. 81-4318. In view of our disposition of the first two appeals, this third one is moot, and we therefor dismiss it.

FACTS

In March 1971, William Ellis (Ellis) conveyed the Silversword Inn to Bessie Hagopian, the sister of Lillian Corey (Lillian). Lillian acted as Hagopian's agent in this transaction. The conveyance was subject to a lease and included an option to repurchase which with extensions, expired unexercised on December 31, 1976. In 1972, Ellis filed a Chapter XII proceeding in the bankruptcy court in Hawaii. Despite the 1971 conveyance, one of the items listed in the bankruptcy estate was the Silversword Inn.

In July 1973, Hagopian conveyed her interest in the property to Lillian. In January 1977, Herbert and Alberta Loui (Louis) and Lillian executed a standard form Deposit Receipt, Offer and Acceptance (DROA) for the sale of the Silversword Inn for \$575,000. In accordance with the DROA, the Louis placed \$175,000

in escrow. Lillian refused to proceed with the sale on August 1, 1977, the scheduled closing date.

On August 12, 1977, the Louis filed a complaint against Lillian in Hawaii state court for specific performance and damages for breach of contract (Hawaii Civil No. 52308). Among Lillian's contentions in defense were that Ellis's transaction with Hagopian was not a sale of the property, but a mortgage transaction in the form of a sale. Thus, Lillian was only a mortgagee and could not convey the property to the Louis. Lillian further argued that the DROA was merely a "try" and that because she could not convey the property, the Louis could not obtain specific performance.

The state court rejected this conclusion, found that Lillian had breached her contract of sale with the Louis, and directed specific performance. In its partial judgment entered on August 7, 1979, the court ordered Lillian to execute an Agreement of Sale, in a form which the court specified. The court added that if Lillian failed to perform within ten days, the clerk was ordered and authorized to execute the Agreement of Sale attached to the judgment.

When Lillian failed to perform, the clerk executed the Agreement of sale and delivered it to the Louis, who signed it, delivered it to escrow, and recorded it. According to the Louis and uncontroverted by Lillian, Ellis paid some or all of Lillian's attorneys' fees in the state action and consulted with Lillian and her attorneys throughout the trial.

Lillian appealed the partial judgment to the state supreme court, but did not obtain a stay of the judgment at that time. On November 9, 1979, the Louis obtained from the state court a writ of assistance to obtain posses-

sion of the property. However, the writ was eventually returned unexecuted. Ellis had warned the sheriff that he or any deputy sheriff entering the property would be liable for trespass if entry was made under color of the writ. Ellis stated that he was the lessee, the Sword, Inc., was his sublessee, the Silversword Trust was the lessor, and that none of them held by, under, or through Lillian Corey, the only defendant in the state action.

The Sword, Inc. brought a separate action in the state court claiming to be in possession of the property and requesting an injunction against execution of the writ of assistance. The complaint was signed by Florence Ellis, Ellis' wife and president of The Sword, Inc. This action was later dismissed voluntarily. In the meantime, on December 3, 1979, Lillian filed in state court her own suit against the Louis. She requested declaratory and injunctive relief, claiming that the writ of assistance was improper because The Sword, Inc., which was in possession of the property, was not a named party in the Louis' state court action and had no relationship to her. Lillian's complaint was *sua sponte* dismissed with prejudice.

On October 24, 1979, Ellis filed in his bankruptcy proceeding a Complaint to Determine Lien against Lillian. Bankruptcy No. 72-391(3). The complaint sought relief on the "mortgage theory" previously raised by Lillian in defense of the Louis' state court specific performance action. Lillian appeared and admitted all allegations in Ellis's complaint and did not oppose the subsequent motion for judgment on the pleadings. At least from this point on, Judge King, a federal district judge, sat by designation as the bankruptcy judge in the Ellis matter. Judgment on the pleadings was filed on

December 7, 1979 and was recorded the same day with the State Bureau of Conveyances.

The Louis were unaware of Ellis's complaint and judgment until February 25, 1980, when Ellis, Lillian, and entities controlled by Ellis and claiming interest in the property through Ellis (e.g., Silversword Trust) filed in Ellis's bankruptcy proceeding a complaint against the Louis to Determine Liens and Other Interests in Property. Bankruptcy No. 72-391(4). The bankruptcy court granted the Louis leave to intervene in Bankruptcy 72-391(3) and vacated the December 7, 1979 judgment on the pleadings. Bankruptcy Nos. 72-391(3) and 72-391(4) were consolidated. Ellis' consolidated amended complaint included all claims from the separate complaints in Bankruptcy Nos. 72-391(3) and 72-391(4) and named Lillian and the Louis as defendants. Lillian filed an answer admitting all allegations, but later added a cross-claim against the Louis, incorporating six counts of Ellis's consolidated amended complaint. The Louis answered Ellis's consolidated complaint and filed a counterclaim and cross-claim seeking to determine their rights as against the other parties to the proceeding.

On September 12, 1980, the bankruptcy court issued a ruling that the March 1971 conveyance by Ellis to Bessie Hagopian was a transfer of fee simple title and not a mortgage transaction. An implied corollary of that ruling was that Lillian was owner of the Silversword Inn and that none of the plaintiffs, including the bankrupt, had any interest in the property.

While the above matters were pending in the bankruptcy court, on September 4, 1980, Lillian, in connection with her appeal of the state court judgment obtained against her by the Louis, filed in the Hawaii

Supreme Court an Application for Ex Parte Order Granting Leave to Deposit Cash in Lieu of Supersedeas Bond. The application was opposed by the Louis. However, on October 2, 1980, the Hawaii Supreme Court granted Lillian's motion with the proviso that if the Louis prevailed on appeal, "any legal damages suffered by Appellees as a result of the stay of execution and in excess of the \$1,000 deposit shall be deducted from the escrow amount and the subsequent purchase payments otherwise payable by Appellees."

Armed with the Hawaii Supreme Court stay of execution, Lillian argued that the Louis' further participation in the bankruptcy proceedings violated the state court stay, even though they were originally brought into the bankruptcy court by Ellis's and Lillian's complaint in February 1980. On October 29, 1980, Lillian filed in the Hawaii Supreme Court a motion to hold the Louis in contempt. Following opposition by the Louis, the motion was voluntarily withdrawn. She subsequently moved for an injunction in support of the supersedeas to restrain the Louis from participating in the bankruptcy proceeding. After the Louis responded, Lillian voluntarily withdrew this motion.

Lillian also filed a motion in the bankruptcy court to stay proceedings based on the state court stay. However, the bankruptcy court refused to grant a stay. As the bankruptcy proceedings neared the entry of a judgment adverse to Lillian, Lillian filed in this court a petition for writ of mandamus to prohibit Judge King from entering a judgment in the bankruptcy proceedings. In mid-January 1981, a panel of this court denied the petition without prejudice to Lillian's seeking a stay pending review in the "appropriate court should

the bankruptcy court take further action on the proposed judgment...."

The bankruptcy court entered judgment on March 10, 1981, ruling in paragraph 1 in favor of the Louis on all counts of plaintiffs' consolidated amended complaint and in paragraph 2 in favor of the Louis and against Lillian on all counts of Lillian's cross-claim. In paragraph 3, the court ruled in favor of the Louis as follows:

- i. The Louis are the owners of the property described in Exhibit 1 hereto ("the property") under an Agreement of Sale between Corey, as seller, and the Louis, as purchasers;
- ii. The Debtor herein, the trustee for the estate of the Debtor, and Additional Counterclaim Defendant Kulalani, Ltd. have no ownership interest or any other interest in the property;
- iii. Plaintiffs Silversword Trust, Robert P. Shaw, and Pauline L. Shaw have no mortgage interest or any other interest in the property;
- iv. Plaintiff, the Sword, Inc., has no leasehold interest or any other interest in the property;
- v. Plaintiff Upland Investments, Ltd. has no mortgage interest or any other interest in the property; and
- vi. The Louis are entitled to possession of the property as against Plaintiffs and Additional Counterclaim Defendant Kulalani, Ltd., and their transferees during the pendency of these adversary proceedings, if any from March 5, 1980, the date upon which the Lis Pendens filed in Bankruptcy No. 72-391(3) and 72-391(4) was recorded with the Bureau of Conveyances of the State of Hawaii.

The bankruptcy court further directed plaintiffs (by this time, Lillian had been redesignated as a defendant) and counter-claim defendant Kulalani, an alleged alter ego of Ellis, to deliver possession of the property to the Louis forthwith and enjoined the same parties from recording with the state Bureau of Conveyances any document depending for its validity on the "mortgage theory" already rejected by the bankruptcy court.

Kulalani had come into the picture on September 1, 1980, when Ellis conveyed his interest in the property to Kulalani for a purchase price of \$766,475.77. The conveyance was intended to maintain between Lillian and Kulalani the mortgagee-mortgagor relationship that purportedly had existed between Lillian and Ellis.

Lillian and the plaintiffs in the bankruptcy proceeding filed a notice of appeal from the bankruptcy court's adverse rulings on February 12, 1981,¹ which was followed by a flurry of motions in the bankruptcy court and here for stays, and joinders in the appeal by other parties.² On March 26, a motions panel of this court

¹ Although the notice of appeal was filed before the entry of the March 10 judgment, the appeal is valid under Fed.R.App.R. 4(a)(2) since the bankruptcy court had announced its decision in orders filed on January 8 and February 11.

² While the Silversword Trust (Robert and Pauline Shaw as trustees) had claimed an interest from January 1, 1980 until September 1, 1980 as a mortgagee of the property, it filed an affidavit in the bankruptcy court in December 1980 disclaiming any interest in the property and indicating that the trust was terminated. William Ellis and Florence Ellis, among others also signed statements of resignation as agents of the Silversword Trust.

Upland Investments, of which William Ellis was the vice president, had claimed a mortgage lien against the Silversword Inn, which was released on September 30, 1980. Upland owned and leased furniture and equipment on the Silversword Inn premises until January 1, 1981, but in affidavits signed in November 1980 and March 1981, Upland disclaimed any interest in the property.

entered the following order:

The court finds that the notice of appeal filed on February 12, 1981, February 19, 1981, and March 12, 1981 [amended notices of appeal] were timely, but were incorrectly directed to this court rather than to the district court. Therefore, the appeal is dismissed for lack of jurisdiction and the notices of appeal shall be forwarded by the clerk of this court to the district court for processing. - Appellants' emergency motion for stay pending appeal is denied as moot, since this court lacks jurisdiction over the appeal. This order is without prejudice to appellants moving for further relief in the district court.

Appellants moved for reconsideration of the dismissal contending that orders entered by a district judge sitting as a bankruptcy judge are appealable to the court of appeals. They also pointed out that another appeal arising in Ellis's bankruptcy proceedings but involving a different piece of property and a different claimant raised the same jurisdictional question. *Ellis v. Cassidy*, No. 80-4021.

Since this court would have to reach the jurisdic-

The Sword of which Florence Ellis was president and for which Helen Ryan, the trustee in bankruptcy for William Ellis, was the attorney, had leased a portion of the Silversword Inn from Ellis from January 1, 1980 and all of the property from Kulalani from September 1, 1980. The lease terminated on November 30, 1980. The Sword subsequently sold all of its personal property on the premises and disassociated its domicile from the premises.

These entities had sought dismissal in the bankruptcy court of the claims involving them on the grounds that any controversy between the Louis and them was rendered moot by their disclaimers of interest in the property. Nevertheless, the bankruptcy court entered judgment against them on the merits.

tional issue as part of the merits of appeal No. 80-4021³ and because the motion for reconsideration appeared to have some merit,⁴ on April 23 the motions panel directed that appeal No. 81-4081 be reinstated. Because of the common jurisdictional issues, the panel added that appeals Nos. 80-4021 and 81-4081 should be heard by the same merits panel. The court also denied appellants' emergency motion for stay and alternative emergency motion for stay. At that point, it still appeared that Lillian (through the state court stay) and Kulalani (through the bankruptcy court's stay with a bond)⁵ would be protected from the Louis' attempts to obtain possession against them. However, this court did not know who was actually in possession.

No stay of the bankruptcy court's judgment having been obtained, on April 13, the Louis filed in the bankruptcy court a motion for issuance of writ of assistance to obtain possession of the Silversword Inn. Hoping to obtain the blessing of the Hawaii Supreme Court, on April 10, the Louis filed in that court a Motion for Determination of Scope of Supersedeas. The Louis represented to the bankruptcy court:

Although the Louis request that this Court order the immediate issuance of the Writ of Assistance, the Louis will not deliver the Writ of Assistance to the Marshal of the District of Hawaii until the Supreme Court of the State of Hawaii determines

³ Appeal No. 80-4021 was properly before this court because the district court (Judge King) issued an order of dismissal of an appeal from the bankruptcy court's judgment.

⁴ See note 9, *infra*.

⁵ In fact, Kulalani never posted the bond. Thus, the stay did not take effect.

that the state court stay does not preclude the United States Bankruptcy Court for the District of Hawaii from enforcing its Judgment by putting the Louis in possession of the property as against parties other than Lillian Hagopian Corey.

The motion for issuance of the writ was opposed by Lillian Corey. She argued that the proposed writ was overbroad because it gave the marshal authority to remove not only parties to the proceeding⁶ but "all and every person and entity holding possession of said premises." In fact, non-parties were in possession. She also contended that because the Louis agreed to be bound by the Hawaii Supreme Court's stay, the writ was premature.

Without waiting for any ruling by the Hawaii Supreme Court on the Louis' Motion for Determination of Scope of Supersedeas, but aware of the Louis' representation that the writ would not be served until they obtained a determination from the Hawaii Supreme Court, on April 20 the bankruptcy court issued the writ. The court orally noted, however, that there might be a problem getting the marshal to remove non-parties from possession. Lillian immediately appealed to this court the April 20 order, No. 81-4213.

On April 28, Lillian Corey served on the U.S. Marshal a document requesting the marshal to return the writ unexecuted and to post a \$750,000 bond to indemnify her for damages for interference with her rights to the property. The marshal refused to post the bond.

On May 19, the Hawaii Supreme Court issued the following order on the Louis' motion:

⁶ The proposed writ listed all parties except Lillian Corey, presumably in attempted deference to the state court stay.

[I]t appears undisputed that Appellant's deposit of cash in lieu of supersedeas bond on October 7, 1980 had the effect of staying any further execution of the Partial Judgment issued in Civil No. 52308. The cases cited by Appellees tend to establish that the supersedeas did not invalidate and did not rescind the previous documentary execution of the subject agreement of sale, although of course the agreement of sale might be subject to eventual rescission in the event that this court should reverse the Partial Judgment. In line with cases from other jurisdictions holding that a supersedeas "suspends the efficacy" but does not "annul" the judgment being appealed, it generally appears that the deposit of cash in lieu of supersedeas bond in the instant case suspended all *active* legal effect of the Partial Judgment pending appeal but did not invalidate the judgment. Thus a court applying Hawaii law might treat the Partial Judgment as a valid judgment but as being presently unenforceable and subject to possible change.

The Bankruptcy Court (or a federal appellate court) is in a better position than this court to judge whether or not the Bankruptcy Court has given active legal effect to the Partial Judgment subsequent to the stay of execution of that judgment.

This court expresses no opinion as to whether the bankruptcy court judgment should be stayed. This court has no reason to interfere with the efforts of the Bankruptcy Court to enforce State law in the instant case.

While the state court did not explicitly state that its stay would not preclude the bankruptcy court from

placing the Louis in possession as against parties other than Lillian Corey, the Louis interpreted the supreme court's ruling as an indication that they were free to proceed with their attempts to obtain possession. The writ was delivered and the marshal proceeded to send notices to Lei-Anne Grouard and Florence Ellis that he would execute the writ against them on June 3.

Lei-Anne Grouard (William Ellis' daughter), Howard and Pamela Holmes (mortgagees under Grouard, and Pamela being William Ellis's niece), and Florence Ellis (William Ellis's wife) immediately filed an action in the federal district court in Hawaii naming the U.S. Marshal as defendant. The action sought a declaration that the bankruptcy court's judgment and writ of assistance were ineffective as against them. Plaintiffs also sought an injunction against the marshal's executing the writ on them. Plaintiffs claimed that their interest in the property was not by or through any party to the bankruptcy proceeding, but rather through Ralph Corey (Ralph), Lillian's ex-husband.

Lillian and Ralph were divorced by decree entered in February 1973. In an order regarding the division of property entered on March 13, 1973, the court (Judge Lum, the same judge who decided the state court case between Lillian Corey and the Louis in 1979) made the following statements regarding Lillian's property dealings with her sister Bessie Hagopian:

The marital estate is to include all properties held by them [Lillian and Ralph] jointly or individually and such properties that were conveyed by the defendant [Lillian] to her sister, Bessie Hagopian, during the period of their marriage The evidence is unclear, uncorroborated and unsupported as

to Bessie's contribution in any of the real properties purchased by defendant. The Court finds that transfers of the properties to Bessie were made by defendant with the intent to defeat plaintiff [Ralph] of his equitable share of the marital estate.

However the property distribution list in the March 13, 1973 order did not include the Silversword Inn.

Lei-Anne Grouard, Howard and Pamela Holmes, and Florence Ellis based their asserted right to declaratory and injunctive protection from execution of the writ of assistance on a November 2, 1980 quitclaim deed from Ralph, followed by a series of lease and mortgage arrangements among Grouard, the Holmeses, and Florence Ellis. In the deed, Ralph stated that because Lillian had failed to disclose to the divorce court that Bessie Hagopian held title to the Silversword Inn as security for money lent by Lillian from marital assets, with the intent to defeat Ralph's equitable share of the estate, Lillian now held his interest in the property as constructive trustee.

On May 28, 1981, the district court (Judge Heen),⁷ denied orally the motion for preliminary injunction. That denial was immediately appealed to this court (No. 81-4318). In due course, that appeal was consolidated with the two appeals from the bankruptcy proceeding.

The final development in this procedural tangle was the decision of the Hawaii Intermediate Court of Appeals⁸ in the consolidated appeals from the two state

⁷ Plaintiffs had filed in the district court a Suggestion of Statutory Disqualification of Judge King.

⁸ The Intermediate Court of Appeals has concurrent jurisdiction with the Hawaii Supreme Court, H.R.S. § 602-57, and hears cases which are assigned to it by the chief justice of the supreme court or his

actions between the Louis and Lillian. That decision was filed on October 20, 1981, just two days before the hearing in this case. The Hawaii court affirmed in part, and reversed and remanded in part, the judgment granting the Louis specific performance of the agreement of sale between them and Lillian Corey, affirmed the dismissal of their complaint against them, and reversed the award of attorney fees to the Louis in the latter action.

ANALYSIS

I. *Appeal No. 81-4081*

For reasons which will appear shortly, the critical issue on which all of these appeals depend is that raised by appeal No. 81-4081 -- whether the March 1971 transaction between Ellis and Bessie Hagopian was a sale or a mortgage.⁹ We turn, therefore to that

designee, H.R.S. § 602-5(8). All appeals are filed in the first instance with the supreme court. *Id.* Generally, the less important cases are assigned to the intermediate court. See Rule 27, Rules of the Supreme Court of the State of Hawaii.

⁹ Before that issue can be reached, however, it must appear that this court has jurisdiction to entertain an appeal from a judgment entered on the bankruptcy docket by a district judge sitting in bankruptcy. As we have noted, a motions panel of this court already once decided that question adversely to appellants, and then reinstated the appeal for further consideration of the jurisdictional question by the merits panel.

The identical jurisdictional question was presented to this panel in *Ellis v. Cassidy*, No. 80-4021, affirmed mem. Nov. 27, 1981. In that case, we said:

Under the old bankruptcy act - and this case arose under the old act - appeals were normally brought from the referee in bankruptcy to the district court. However, Bankruptcy Rule 901(8) supports the conclusion that a judgment of the district judge acting as bankruptcy judge is appealable directly to the circuit. Rule 901(8) defines "judgment" to include "any order appealable to the district court or, if entered by a district judge

issue.

A. Mortgage or Sale?

The subject property herein was also the subject property in a prior Chapter XII proceeding filed by Ellis, Bankruptcy No. 70-249, in which an Amended Real Property Arrangement was confirmed by the court on January 22, 1971. That arrangement provided, among other things, as follows:

The subject property shall be conveyed by the debtor [Ellis] to the purchaser [Bessie Hagopian] free and clear of liens, but subject to a lease to creditor SILVERSWORD CORPORATION and a repurchase option to the debtor [Ellis], as provided

when acting as a bankruptcy judge, appealable to the court of appeals." Bankruptcy Rule 901(7) provides:

"Bankruptcy judge" means the referee of the court of bankruptcy in which a bankruptcy case is pending, or the district judge of that court when issuing an injunction under section 11(a)(15) of this title and when acting in lieu of a referee under section 71(c) of this title or under Rule 102.

Although these rules were promulgated in 1973 after plaintiff had filed his petition, they were made applicable to pending proceedings, where they would not work injustice, by an April 24, 1973 Order of the Supreme Court. No reason has been brought to our attention why the Bankruptcy Rules, which contemplate appeals from a district court judge in a bankruptcy proceeding to the court of appeals, should not provide jurisdiction in this case. Section 403 of the Bankruptcy Reform Act, entitled "Savings Provisions," provides that a case that was commenced under the 1898 Act, and any matters and proceedings related to such case, shall be conducted and determined under that Act as though the 1978 Reform Act had not been enacted. The interest of justice would not be served by further delaying a disposition on the merits on grounds not raised by the defendant.

We adhere to that reasoning in holding that we have jurisdiction to hear the instant appeal.

in aforesaid agreements filed in this proceeding.

Subsequently Ellis executed and delivered to Bessie Hagopian a Warranty Deed, subject to an existing lease to the Silversword Corporation and a repurchase option to Ellis. The bankruptcy court's conclusion that this transaction was a sale and not a mortgage was based on its reasoning that, under the principle of *res judicata*, it was bound by the court-confirmed arrangement in Bankruptcy No. 70-249, and that this arrangement called for a sale of the property from Ellis to Hagopian, and not for a mortgage.

The appellants do not dispute that the prior bankruptcy proceedings must be given *res judicata* effect. They argue, however, that what was confirmed was a mortgage. Their position is that under Hawaii law, a warranty deed purporting to convey a fee simple, but subject to a repurchase option in the grantor, is a mortgage instrument, and that the original bankruptcy court (in 70-249) was aware of this.

1. *Relevant Hawaii Law*

The law of other jurisdictions varies as to the effect of a deed absolute on its face coupled with a repurchase option. See *Swallow Ranches, Inc. v. Bidart*, 525 F.2d 995, 997-98 (9th Cir. 1975) (collecting cases and authorities). The Hawaii cases, however, do not disclose any similar uncertainty on this question. All reported cases bearing on the issue either support or are consistent with the position that the 1971 transaction was a mortgage.

In *Makuakane v. Tanigawa*, 50 Haw. 493, 443, P.2d 153 (1968), the court was faced with an instrument which contained an absolute conveyance in one portion,

and in the other portion the following proviso:

PROVIDED HOWEVER; if the sum of One Hundred Ten (\$110.00) Dollars is paid in full within one (1) year . . . then this conveyance shall be of no force and effect.

Id at 494-95, 443 P.2d at 154. The court observed:

The instrument is basically in the same form as modern mortgages drafted in this jurisdiction. That is, a mortgage usually contains an outright or absolute conveyance to a mortgagee with a disfeasance clause whereby it is stated that upon the payment of a certain sum of money the deed shall become null and void. *The law is clear that where an absolute conveyance contains a disfeasance clause, the instrument is a mortgage.*

Id. at 495, 443 P.2d at 155 (emphasis added).

Under Hawaii law it does not matter whether the disfeasance clause appears on the face of the deed, on a separate writing, or even in a mere oral agreement. *Kahau v. Booth*, 10 Haw. 332, 333-34 (1896). *Kahau* involved a deed absolute on its face, and a simultaneously executed repurchase option on a separate page. The court held that the transaction was a mortgage.¹⁰ See also *Chave v. Dowsett*, 6 Haw. 221 (1878). While *Kahau* is indeed an old case, appellees have cited no

¹⁰ *Kahau* also settles another issue that has some bearing here. In *Kahau*, the time for exercise of the repurchase option had already passed. The same is true of the repurchase option in the present case. The *Kahau* court stated, "It made no difference that the time of repayment had been allowed to pass. Once a mortgage always a mortgage, and the mortgagor is allowed to redeem." 10 Haw. at 334. *Makuakane, supra*, makes the same holding by implication.

Hawaii case which overrules it or even questions its authority. It was cited as precedent in *Makuakane, supra*, 50 Haw. at 495, 443 P.2d at 155. It was also cited and explained in *Kawauchi v. Tabata*, 49 Haw. 160, 170, 413 P.2d 221, 227 (1966). *Kawauchi* itself also directly supports the conclusion that the transaction here was a mortgage. *Kawauchi* involved a deed absolute with a leaseback and an option for the lessee to purchase the property. The transaction was held to be a mortgage, not a sale. 49 Haw. at 180, 413 P.2d at 232.

Appellees cite several cases in support of their contention that "there is a heavy presumption in favor of interpreting such transactions in accordance with their form." Brief of Louis at 37. None of those cases help appellees, although they do illustrate the fact that the law varies from one jurisdiction to another on this point. *Swallow Ranches, Inc. v. Bidart*, 525 F.2d 995 (9th Cir. 1975), actually holds that the "substance of the transaction and the intent of the parties" is controlling, not the form. 525 F.2d at 998. But more important, the case construes and applies Nevada law and has no bearing on the issue here. *Rizo v. MacBeth* 398 P.2d 29-09 (Alaska 1965), was concerned with the direct reformation of a deed. There is no mention in the case of any repurchase option or agreement, and no discussion of what effect such an agreement might have. And the case deals with Alaska law. *Blue River Sawmills, Ltd. v. Gates*, 225 Or. 439, 358 P.2d 239 (1960), declined to find a mortgage, observing that the test is "whether there is an unsatisfied indebtedness owing the grantee which is enforceable independent of the deed." *Id.* at 460, 358 P.2d at 249. But this test is explicitly rejected in *Kawauchi, supra*, 49 Haw. at 172-76, 413 P.2d at 228-30. *Blue River Sawmills* is

thus not a reliable guide to Hawaii law. *Glasgow v. Andrews*, 129 Cal.App.2d 660, 277 P.2d 400 (1954), turned on a factual dispute regarding the intention of the parties, the affirmance by the California Court of Appeals of the trial court's finding that a sale was *intended* does not shed light on the legal issue presented here.

We note that many jurisdictions regard the intent of the parties to be the controlling factor in determining whether a transaction is a sale or a mortgage. *See, e.g., Swallow Ranches, Inc. v. Bidart, supra*, 525 F.2d at 997-98 (collecting cases). This is the rule in Hawaii as well. *See Haw.Rev.Stat. § 506-1(a) (1976)* ("Every transfer of an interest in real property . . . subject to disfeasance upon the payment of an obligation . . . is to be deemed a mortgage . . ."); *Hess v. Paulo*, 38 Haw. 270, 285-86 (1949) (construing former Haw.Rev.Stat. § 8871 (1945), now codified at § 506-1) (purpose of rule is "to ensure effectuation of the genuine purpose and intention of the parties by subordinating thereto the ostensible form in which the transaction is finally couched"). *See also Kawauchi, supra*, 49 Haw. at 170-71, 413 P.2d at 227; *Ah Chong v. Kaluahine*, 9 Haw. 571, 574 (1894). In the instant case, however, there is no indication in the record that the bankruptcy court engaged in any analysis of the facts which would bear on the intent of the parties and the true substance of the transaction. Instead, the court seems to have based its determination on the form of the transaction alone.

2. *The Judgment in Bankruptcy No. 70-249*

Even though Hawaii law is settled that a deed absolute coupled with a repurchase option creates a mortgage when the parties so intend, the possibility exists

that the bankruptcy court that approved the transaction understood it to be a sale and based its approval on that understanding. If that, were the case, the principle of *res judicata* would provide sufficient basis to affirm the judgment below. Examination of the record, however, reveals no such understanding by the bankruptcy court and, in fact, suggests that the transaction was understood from the outset to be a mortgage.

Of particular interest is Ellis's application filed with the bankruptcy court seeking confirmation of the proposed arrangement. That application included the following recitations:

7. . . .

- a. That the debtor convey the subject property to Bessie Hagopian upon the payment into the registry of this Court the balance of the purchase price of \$85,500.
- b. That said sale be subject to the existing lease to SILVERSWORD CORPORATION, . . . yielding to the purchaser a net return of 10 percent per annum, after gross income taxes, on her investment of \$85,500.
- c. That said sale be subject to an assignable repurchase option to the debtor, to be exercised within two years after conveyance, providing for an additional increment of 5 percent per annum to Bessie Hagopian upon repurchase by the debtor.

* * * * *

10. . . That the creditors affected thereby have unanimously accepted the Amended Arrangement by filing Acceptances in this proceeding

* * * * *

12. That . . . lessee SILVERSWORD CORPO-

RATION is obligated to pay a percentage rental . . . ; and that . . . any rental in excess of the fixed rental payable to Bessie Hagopian shall be payable to the debtor or his assigns.

13. That, upon execution of the Amended Arrangement,

* * * * *

c. The aggregate principal sum of \$36,647.57 plus interest from 1959-1962 so consolidated and assigned to creditor SMITH shall be compromised to \$28,500.00 plus a 5 percent fee for . . . a total of \$29,925.00,

d. The compromised sum of \$29,925.00 shall be secured by a pledge to creditor SMITH of the debtor's option to repurchase the subject property, and

e. Said compromised sum shall be paid without interest from the debtor's assignment of percentage rentals from lessee SILVERSWORD CORPORATION in excess of the fixed rental due Bessie Hagopian . . .

14. That, upon the execution of the Amended Arrangement, the following claims of creditor SILVERSWORD CORPORATION shall be deferred and applied contra future rental payments due the debtor or his assigns . . . after payment of fixed rentals due Bessie Hagopian and percentages rentals in excess thereof assigned to creditor SMITH:

Claims now assigned to creditor SMITH and secured by a second mortgage . . . \$8,261.58

* * * * *

19. That, therefore, the effect of the Amended Arrangement is a down payment by your applicant

[Ellis] of \$8,114.41 on a purchase price of \$187,000.00, the assumption of \$85,127.01 in claims against the grantor, and the payment of \$85,500.00 on account.

Notice that paragraph 7(b) sets the income to Hagopian from the preexisting lease to Silversword Corporation, which was operating a restaurant on the premises, as a percentage of her "purchase price," and an amount that was less than Silversword was obligated to pay under the preexisting lease. While perhaps consistent with the theory that the transaction is a sale, this feature supports more readily the conclusion that Hagopian was merely a lender of money. Ordinarily, the purchaser of real estate expects future income from the property to bear a relation to the future *value* of the property, and at least *hopes* that the future income will relate favorably to the original purchase price. Here, however, Hagopian stood to gain nothing from future appreciation of the property, or increased profitability of the lessee Silversword Corporation. Instead, she would get a regular, fixed income set by reference to her initial investment -- the usual expectation of a lender of money. Of course she did run the risk that the property would become worthless or that the lessee business would fail. This risk, however, is typical of the mortgagor-mortgagee transaction.

Secondly, the remainder was to be applied to satisfy *Ellis's* other debts. (paragraphs 12, 13, 14). This fact, too, suggests that Ellis was to remain the owner of the property, since beneficial ownership of property typically includes the right to enjoy the income generated by it. Satisfaction of Ellis's debts is a benefit to Ellis, not to Hagopian. Of course, this feature of the trans-

action is not conclusive either, since the owner of property is free to assign the rents to another. The suggestion is strengthened, however, by the recitation of paragraph 19 that Ellis was making a downpayment on the purchase price of the property.

Thirdly, Ellis stood to benefit, under the terms of the arrangement, from any appreciation in the value of the property since in the event of such appreciation, he was free to exercise the repurchase option and recover title to the property. Hagopian would then get only the return of her original investment plus a percentage increase. In this respect, Ellis again appears to have enjoyed the advantage of ownership, and Hagopian appears once again in the role of a mortgagee.

Finally, if this transaction is nevertheless regarded as a sale to Hagopian, it is striking how little she got in comparison with the usual "bundle of rights" comprising fee simple title. The value of her interest is substantially unrelated to possible future appreciation of the property. It is subject to a lease of the whole parcel. It is defeasible. In reality, at least during the term of the lease and option, she got nothing but a flow of income calculated as a percentage of her investment.

In holding that the bankruptcy court confirmed a sale rather than a mortgage Judge King nowhere discussed or even mentioned any of these recitations. His conclusion appears to have been based only on the form of the deed itself, and on language in the bankruptcy No. 70-249 order calling for a transaction memorialized in that form. In view of our survey of relevant Hawaii law, and in view of the absence of any findings as to the actual intent of the parties, we must conclude that the characterization of this transaction as a sale

rather than a mortgage was error. We prefer not to speculate as to whether, in a full hearing, the evidence would support a finding that the parties intended a sale, or a finding that the bankruptcy judge in bankruptcy No. 70-249 understood the transaction to be a sale and based his order of confirmation on that understanding. Accordingly, we do not reach the question whether either such possible finding would support a judgment in favor of the Louis.

3. The Effect of the State Court Proceedings Between the Louis and Lillian Corey

When the Louis sued Lillian in state court for specific performance of the agreement of sale between them, one of the defenses was that Lillian did not even own the property. This defense was based on the mortgage theory discussed above. The Louis now argue that the judgment in their favor in the state trial court, now affirmed in relevant part on appeal,¹¹ requires this court to reject the mortgage theory on principles of collateral estoppel and stare decisis.

Ellis, of course, and many of the other parties to these consolidated appeals, were not named parties to the state court action. Whether they could be bound by any collateral estoppel effect of that action would depend on the extent to which they had an interest in, and exercised control over, the litigation in the state courts. *Montana v. United States*, 440 U.S. 147, 154, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979). It is not

¹¹ The Intermediate Court of Appeals remanded for the purpose of deleting two paragraphs from the Agreement of Sale the trial court had ordered the parties to execute, which the court of appeals held were erroneously included in the Agreement. In all other respects, it affirmed the judgment of the trial court.

necessary, however, to undertake that analysis here because, the state trial court, as we read its decision, did not hold that the March, 1971 transaction was a sale.

We note at the outset that Judge Lum, in the state action, made a number of findings of fact relating to the March 1971 transaction and the mortgage theory. He found that circumstances of the kind surrounding the transaction in *Kawauchi, supra* did not exist here. However, he stopped short of making an explicit finding that the transaction was a sale and not a mortgage.¹² At the same time, He made findings which would support the judgment rendered even if the transaction had been a mortgage. For instance, he found that Lillian Corey was "estopped to now deny ownership of the property" because of her own representations before and during the litigation. He also noted that "[d]efendant could have achieved a conveyance of the property free and clear from all encumbrances even if she had in fact only the interest of a mortgagee therein," because of an outstanding offer by Ellis to convey the property to the Louis under a formula by which she would have received \$282,500 -- more than she claimed to be entitled to under the mortgage theory. In view of these observations by Judge Lum, we do not see in his opinion an unequivocal finding that the 1971 transaction was a sale rather than a mortgage.

Even if there were an unequivocal finding that the transaction was a sale, we would not be able to apply it as a bar under principles of collateral estoppel or stare decisis. It is hornbook law that both of these

¹² We decline to guess whether Judge Lum would have made such a finding if it had been necessary to support the judgment he rendered.

principles give effect only to matters that have formed an essential basis for the earlier decision. But the prior action here was for enforcement of a contract between the Louis and Lillian. Lillian agreed to sell the Silversword Inn to the Louis. She failed to perform her agreement by delivering possession. Ordinarily, a person is not relieved of liability for breach of a promise to sell property simply because he or she turns out not to have marketable title. Of course, specific performance of such an agreement will not be decreed if the defendant does not have and cannot obtain title. 5A Corbin on Contracts ¶1170 at 255 (West 1964). But that rule does not apply where, as Judge Lum found here, there is a contract between the vendor and the true owner under which the vendor can obtain title. *See id.* at 256. We conclude that it was unnecessary for the court to decide whether the 1971 transaction was a sale or a mortgage, and that therefore no such decision stands as a holding of the case.¹³

B. Remaining Issues in Appeal No. 81-4081

Appellants contend that once Judge King rejected the mortgage theory and ruled that the bankrupt Ellis had no interest in the subject property, he no longer had jurisdiction to resolve disputes between the other parties to the adversary proceedings regarding title to

¹³ The Intermediate Court of Appeals did not discuss the mortgage theory in its partial affirmance of the trial court decision. Its opinion thus contains no dicta either agreeing with, or contrary to, our conclusions regarding Hawaii law on this subject. Arguably, the trial court's written findings of fact and conclusions of law do contain contrary dicta. As noted in the text, they are suggestive of a finding that there was a sale rather than a mortgage. To the extent that such dicta are contrary to the Hawaii Supreme Court cases on the subject, on which we have relied, they cannot control our decision.

that property. Although we are remanding for a fresh determination of the mortgage question, this issue will arise again if the bankruptcy court determines on remand that there was no mortgage. We note for future guidance that we find no error in the approach taken by the bankruptcy court.

It is true, of course, that “[a] court of bankruptcy cannot entertain jurisdiction of a private controversy which does not relate to matters pertaining to bankruptcy,” *First State Bank & Trust Co. v. Sand Springs State Bank*, 528 F.2d 350, 353 (10th Cir. 1976), and that it “lacks jurisdiction of a controversy solely and exclusively between third parties which does not involve, directly or indirectly, the bankrupt or its property,” *id.* But neither of these principles apply here. The court below had jurisdiction over the property because Ellis claimed title to it and was apparently in actual possession at the time his petition initiating the bankruptcy proceedings was filed. Upon filing of the bankruptcy petition, the property passed into the custody of the bankruptcy court, which then had jurisdiction to determine controversies concerning the property. 2 *Colliers* ¶23.04 at 457-58 (14th ed. 1979).

Furthermore, an independent ground exists here supporting the jurisdiction of the bankruptcy court. Consent of the parties will confer such jurisdiction in a bankruptcy adversary proceeding. See *Collier’s* ¶23.08 (14th ed. 1979). “Nor have the courts found any difficulty in deciding that consent will confer jurisdiction where, without consent, even a plenary suit would have been cognizable only in a state court.” *Id.* at 536. Appellants here initiated the adversary proceeding in question, and can hardly now deny that they have therefore consented.

Neither of the cases cited by the appellants runs counter to the conclusions just stated. *Kaplan v. Guttman*, 217 F.2d 481 (9th Cir. 1954), did not involve property that was actually or constructively in the possession of the bankrupt or trustee. The same may be said of the disputed certificates of deposit in *First State Bank & Trust Co v. Sand Springs State Bank*, 528 F.2d 350 (10th Cir. 1976). Nor has our research disclosed any authorities to the contrary. We conclude that the bankruptcy court did have jurisdiction to adjudicate the competing claims to the subject property of all the parties to the adversary proceeding.

II. *Appeal No. 81-4213 and Appeal No. 81-4318*

On April 20, 1981, on motion of the Louis, Judge King ordered the issuance of a writ of assistance directing the marshal to eject from the Silversword Inn Ellis and other named parties, and "all and every person and entity holding possession of said premises." The appeal is taken on the basis that the writ was overbroad because it ran, by its terms, against persons who were not party to or bound by the underlying judgment, and on the basis that the issuance of such a writ was barred by the supersedeas order then in effect, staying execution of the state court judgment obtained by the Louis against Lillian.¹⁴ In view of our decision reversing and remanding the underlying judgment, the writ must be vacated. We need not reach the substantive questions raised by the appellants.¹⁵

¹⁴ As a result of the October 20, 1981 decision of the Intermediate Court of Appeals of Hawaii disposing of Corey's appeal, that supersedeas is no longer in effect.

¹⁵ We note, however, that language practically identical to that complained of here has been approved before. *State v. Frandsen*, 176 Wash. 558, 30 P.2d 371, 372 (1934) ("all persons... who are in possession

When the writ of assistance was issued, William Ellis's wife, Florence Ellis, was in possession of the premises as the lessee of William Ellis's daughter, Lei-Anne Grouard. Grouard claimed a title independent of that claimed by William Ellis in the bankruptcy proceedings. The marshal notified Florence Ellis and Grouard that he would execute the writ against them on June 3. They went to federal district court seeking a declaration that the bankruptcy court judgment and writ were ineffective against them, and requesting a preliminary injunction against execution of the writ. The request for preliminary injunction was denied orally by Judge Heen, and plaintiffs took this appeal. Because we have determined that the writ of assistance itself must be vacated, this appeal is now moot.

For the reasons stated above, the judgment below in appeal No. 81-4081 is reversed and remanded for proceedings not inconsistent with this opinion; the writ of assistance appealed from in appeal No. 81-4213 is vacated; and appeal No. 81-4318 is dismissed.

of the premises"); *Pacific States Savings and Loan Co. v. Harwell* 204 Cal. 3370, 371, 268 P. 341 (1928) ("all and every other person or persons holding or detaining the said premises"). Whether such a writ could be *enforced* against a non-party is another question, however.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In the Matter of
WILLIAM S. ELLIS, JR.,
Debtor.
and
HELEN B. RYAN, etc., *et al.*
Plaintiffs,
vs.
ILLIAN H. COREY, *et al.*,
Defendants,
and
HERBERT H.K. LOUI, *et ux.*,
Defendants,
vs.
KULALANI, LTD., etc.,
*Additional Counter-
claim Defendant.*

Filed August 24, 1984

Entered on Docket August 24, 1984

**ORDER DENYING MOTION FOR LEAVE TO AMEND
ANSWER AND GRANTING CROSS-MOTION TO DISMISS
ADVERSARY PROCEEDINGS**

Defendant LILLIAN H. COREY's Motion for Leave to Amend Answer, filed herein on June 29, 1984, and Trustee HELEN B. RYAN's Cross-Motion to Dismiss Adversary Proceedings, filed herein on July 12, 1984, having come on regularly to be heard before the Honorable MARTIN PENCE on Wednesday, August 1, 1984, at 1:30 p.m., and PAUL MAKI, Esq. and CORA I. O'DONNELL, Esq. having appeared in behalf of Defendant LILLIAN

H. COREY; HELEN B. RYAN, Esq. having appeared *pro se*; PHILLIP L. DEAVER, Esq. having appeared for Defendants LOUI; and WALTER R. SCHOETTLE, Esq. having appeared for Plaintiffs SILVERSWORD TRUST, et al. and Additional Counter-claim Defendant KULALANI, LTD., and the Court being fully advised of the premises, and good cause appearing therefore,

IT IS HEREBY ORDERED that Defendant LILLIAN H. COREY's Motion for Leave to Amend Answer is hereby DENIED; and

IT IS FURTHER ORDERED that Trustee RYAN's Cross-Motion to Dismiss the above-entitled adversary proceedings is hereby GRANTED, and that said adversary proceedings, No. BK-72-391(3) and No. BK-72-391(4), hereby stand DISMISSED.

DATED: Honolulu, Hawaii, August 24, 1984.

/s/ Martin Pence
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ Paul Maki
Attorney for Defendant
LILLIAN H. COREY

/s/ Walter R. Schoettle
Attorney for Plaintiffs
Silversword Trust et al.,
and Additional Counterclaim
Defendant KULALANI, LTD.

/s/ Phillip L. Deaver
Attorney for Defendants
LOUI

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

In the Matter of
WILLIAM S. ELLIS, JR.,
Debtor.
and
HELEN B. RYAN, etc., *et al.*
Plaintiffs,
vs.
ILLIAN H. COREY, *et al.*,
Defendants,
and
HERBERT H.K. LOUI, *et ux.*,
Defendants,
vs.
KULALANI, LTD., etc.,
*Additional Counter-
claim Defendant.*

BANKRUPTCY NOS.
72-391(3) AND
72-391(4)
(Consolidated)

Hearing Date August 1, 1984

TRANSCRIPT OF ORAL DECISION DENYING COREY'S
MOTION TO FILE AMENDED ANSWER

THE COURT: Well, let's stop right there.

Why shouldn't this matter be dismissed right now, this motion to dismiss?

MR. MAKI: The reason being, is that the property is listed as an asset of the bankrupt's estate; there is dispute relating to the

THE COURT: Well, Lillian Corey cannot possibly come in, as this Court sees it, come in on leave to amend answer when she isn't even in the case.

MR. MAKI: Well, that's why I stated, your Honor, that perhaps it would have been best to stylize the motion

THE COURT: Stylize it, oh, no, Counsel. You can't orally come in and say, "Oh, your Honor, please, I want to change this from a motion for leave to amend to a motion to intervene." You can't do that. You know that; I know that; just orally like this, based upon the papers now before the Court.

MR. MAKI: Your Honor, all I can do is say that some amount of apology is that we got into this case extremely late. The record was quite scrambled. I would request

THE COURT: Well, I will agree that anything that you might say, that certainly you're in late. I don't know a thing about the scrambling of the record; but here you have caused the trustee to come into Court, and move to dismiss and everything else, like that.

Right now I'm going to, and do dismiss this motion for leave to amend answer, because this party has no standing in this case at all to amend anything.

MR. MAKI: Fine, your Honor. May we be given a reasonable opportunity to file a motion

THE COURT: Counsel, you can do what you please. That's all I can say. All that I'm doing is ruling now; and, frankly, I feel that this is a matter in which sanctions, frankly, sanctions should be imposed for filing this, as the Court would view it, what amounts to just a frivolous motion. It may have been through inadvertence, and whatever the rest; the result is people have been put to trouble.

How much does it cost you, Mrs. Ryan?

MS. RYAN: Oh, I would say that I have put in at least two and a half hours.

THE COURT: And what do you think that's worth?

MS. RYAN: Two hundred dollars.

THE COURT: Well, I'm going to do it this way.

Counsel, if you can make your peace with Mrs. Ryan, then I won't issue a show cause order; but you'd better make your peace with Mrs. Ryan as to how much your client wants to pay her for the trouble that you put her to to come in and file a responsive pleading to this motion.

MR. MAKI: Fine, your Honor.

THE COURT: And, Mrs. Ryan, you report to my Clerk Katy, here, within the next 48 hours as to whether or not you want the Court to go ahead with the show cause order.

MS. RYAN: Yes, your Honor.

THE COURT: Stand in recess.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re	BANKRUPTCY NO. 84-00371
LILLIAN HAGOPIAN COREY, <i>Debtor,</i>	
<hr/>	
LILLIAN HAGOPIAN COREY, <i>Plaintiff,</i>	ADV. PRO. NO. 85-0185
vs. KULALANI, LTD., <i>et al.,</i> <i>Defendants,</i>	
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Filed November 2, 1987

Entered on Docket November 3, 1987

ORDER DENYING MOTION FOR LEAVE TO FILE A SECOND
AMENDED COMPLAINT

Plaintiff LILLIAN HAGOPIAN COREY's Motion for Leave to File a Second Amended Complaint filed herein on July 21, 1987, having come on regularly to be heard before the Honorable Martin Pence on Tuesday, October 29, 1987, at 10:30 o'clock a.m. and Clyde Umebayashi, Esq., and Chunmay Chang, Esq., having appeared in behalf of Plaintiff in support of the motion and Helen B. Ryan, Esq., having appeared *pro se* as Trustee of the Estate of William S. Ellis, Jr., Debtor (No. BK-72-391) in opposition thereto, and the Court being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED that Plaintiff LILLIAN HAGOPIAN COREY's Motion for Leave to File a Second Amended Complaint is hereby DENIED.

DATED: Honolulu, Hawaii, November 1, 1987.

/s/ Martin Pence
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ James N. Duca
Attorney for Plaintiff
LILLIAN H. COREY

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re	BANKRUPTCY NO. 84-00371
LILLIAN HAGOPIAN COREY, <i>Debtor,</i>	
<hr/>	
LILLIAN HAGOPIAN COREY, <i>Plaintiff,</i>	ADV. PRO. NO. 85-0185
vs.	
KULALANI, LTD., <i>et al.,</i> <i>Defendants,</i>	

Hearing date October 20, 1987

TRANSCRIPT OF ORAL DECISION DENYING COREY'S
MOTION TO FILE SECOND AMENDED COMPLAINT

THE COURT: Well, I said a few moments ago regarding this, that this case only started about 15 years ago.

I have before me the citation in the matter of Ellis, 674 Fed. 2nd, 1238, 1982, in which they set forth in a, what, about a 17-page printed opinion, the Ninth Circuit goes into the history of the Silversword Inn, Ellis, Mrs. Corey and the Louis.

The amount involved here was some \$766,475.77 back in 1980. Less than that before that.

Involved here is a \$750,000 judgment against Mrs. Corey obtained by the Louis.

One of the rules regarding amendments is if you knew all of these facts, why didn't you plead them when you first had your first go-around or why didn't you plead them on the second go-around when you

amended the second time.

As I review this motion to amend, again, in the light of the history of this case, it appears to me from the record here that Mrs. Corey wants to relitigate the same problems that have been under litigation for 15 years, bringing in matters that she knew a long time ago, could have put in 16 years ago, 10 years ago, 5 years ago, 3 years ago in the various pleadings that's come along the line and in this particular last pleading now before me in *re Corey*, in *Corey versus Kulalani, Limited, et al.*, adverse proceedings.

Going down through the records and adding on to the 1982 opinion of the Ninth Circuit:

On April 24th, 1984 Mrs. Corey lost down in the state court regarding the sale of this same Silversword Inn.

And the awarded judgment against Mrs. Corey was about \$750,000. That was April 24.

On August 6th, Mrs. Corey filed Chapter 11 Bankruptcy here in this court.

On September 6th, '85, here came this complaint now before the Court, two years later, regarding the ownership rights, same problems, which is reflected in a 1982 opinion of the Ninth Circuit; filed an adversary complaint regarding the ownership rights to the Silversword Inn.

October 1st, 1985, Judge Coil [Coyle], sitting as a borrowed judge here, found that the Louis had a valid final judgment, that it would afford full faith and credit under 28 USC, Section 1738, and nothing therein could validate a collateral attack on the final state court judgment.

And it found that Mrs. Corey had been dilatory and inconsistent in the litigation in the matters involving

the Silversword Inn.

That was in '85, October 1st; two years ago.

On September 11th, some six weeks ago, I dismissed, or in the alternative, granted summary judgment brought by Louis on Counts 1 and 4 of Mrs. Corey's complaint.

And this May 27th, Examiner Bocken concluded that Mrs. Corey should not appeal that decision to the Ninth Circuit.

I'll not go into what occurred after that when Mrs. Corey insisted she's going to appeal anyhow. But that's off to one side at the moment.

But on July 27th -- No. On July 21st, this is '87, Mrs. Corey filed this motion for leave to file a second amended complaint.

On July 27, '87, the Ninth Circuit granted the Louis' motion to dismiss Mrs. Corey's appeal and so forth for lack of jurisdiction and lack of prosecution and so forth.

Now, as I reviewed the second amended complaint, I can only say that it appeared as I reviewed it that the purpose of this complaint was to add defendants who claim or may claim an interest in Silversword Inn and chain [obtain] an adjudication of the validity and proof of claim of these added defendants, articulate claims and defenses arising from inequitable conduct on the part of certain defendants other than the Louis

And, of course, Mrs. Corey's claims or the substance of the action remain the same.

As this Court reviewed the whole history of this case, it appears that Mrs. Corey again, I'll repeat myself, wishes to relitigate.

There seems to be in perpetuity the issue of her rights in the Silversword Inn.

Now, if we happen add [hadn't had] all of this prior history and the numerous judicial determinations finding against her claimed interest in the property, then we might have a different picture here.

But as the court reviewed it, it seems this is part and parcel to the same thing that Judge [Coyle] found back in October in 1985, two years ago, that Mrs. Corey, what is it, has been dilatory and inconsistent in her litigation regarding the matters of the Silversword Inn.

Now, the Court recognizes that the denial or granting the leave to amend is within the discretion of the Court, and the Court's discretion will not be set aside unless it's arbitrary and all the rest of it.

In this particular case, Mrs. Corey had an opportunity heretofore to amend her complaint.

She filed her first amended complaint, I repeat, November the 11th, 1985.

This Court is not about to extend this litigation any further than is absolutely necessary in the interest of justice.

All of the allegations which she now brings certainly were known to her back in 1985, at the time of the filing of the original complaint and the first amended complaint.

And she knew or should have known about the misconduct of Mr. Ellis long before October -- or, pardon me, July 1987.

At the time of her first amended complaint, she should have known all about the conduct of Mr. Ellis, having been associated with this litigation and with his activites therein since 1972.

And as the Court has reviewed it, it seems that she wishes to inject new issues into this case, not [now]

quoting, in the hope of achieving a different result regarding her ownership rights in the Silversword Inn.

That's out of a Southern District of California case in 1985.

I note also that Judge Moon agreed with Judge [Coyle] regarding Mrs. Corey's inconsistency and her litigation tactics.

This Court is also well aware of the fact that her counsel has had the devil's own time trying to -- that's Mr. Duca -- has had the devil's own time trying to get her to follow a legal and logical course in the conduct of this litigation.

I refuse to allow this case to be delayed any more by filing of any more amended complaints.

For the reasons I've indicated, the motion to file a second amended complaint is denied.

Mrs. Ryan, prepare the order.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

In re	BANKRUPTCY NO. 84-00371
LILLIAN HAGOPIAN COREY, <i>Debtor,</i>	
LILLIAN HAGOPIAN COREY, <i>Plaintiff,</i>	ADV. PRO. NO. 85-0185
vs. KULALANI, LTD., <i>et al.</i> , <i>Defendants,</i>	

Filed April 7, 1988

Entered on Docket April 11, 1988

ORDER CONTINUING HEARING ON MOTION FOR ORDER
AUTHORIZING THE LISTING OF PROPERTY FOR SALE
AND THE SALE OF PROPERTY FREE AND CLEAR OF LIENS
AND OTHER INTERESTS, AND SETTING DATE FOR
HEARING TO DETERMINE PROPERTY INTERESTS IN THE
SILVERSWORD INN

Presently on the Court's calendar for May 5, 1988 is Plaintiff Lillian Corey's Motion for Order Authorizing the Listing of Property for Sale and the Sale of Property Free and Clear of Liens and Other Interests. Lillian Corey, as debtor in possession of the Silversword Inn, moves the Court of authority under 11 U.S.C. section 363(f)(4) to list and sell that property free and clear of disputed adverse interests. Helen Ryan, Trustee for the bankruptcy estate of William S. Ellis, Jr., opposes the motion on several grounds, most notably that Mrs. Corey has only a mortgagee interest in the Silversword Inn and that she

should be estopped or prevented under various theories from asserting anything more than this mortgagee interest in the Silversword Inn.

The Silversword Inn was the subject of the Ninth Circuit's decision *Matter of Ellis*, 674 F.2d 1238 (9th Cir. 1982). The Ninth Circuit reversed a summary judgment by Judge King, wherein he had determined that Herbert and Alberta Loui were the owners of the Silversword Inn, and that the other parties, and that the other parties, e.g., Lillian Corey and William Ellis, had no interest in it. *Id.* at 1239. Judge King had determined that the transaction between William Ellis and Bessie Hagopian was a sale and not a mortgage. *Id.* at 1246. (Bessie was Lillian Corey's sister, and Bessie later conveyed whatever interest she had in the Silversword Inn to Lillian. *Id.* at 1240.) The Ninth Circuit reversed Judge King, because there was no indication in the record that he had engaged in any analysis of the facts that would bear on the intent of the parties and the true substance of the transaction. *Id.* at 1247. The Ninth Circuit remanded the matter, leaving open the possibility of an evidentiary hearing to determine the exact nature of the transaction based on the intention of the parties. See *id.* at 1250 ("[W]e are remanding for a fresh determination of the mortgage question") After remand, however, the Court never made a "fresh determination of the mortgage question," because the adversary proceeding was dismissed by the Court about two years later. Order Denying Motion for Leave to Amend and Granting Cross-Motion to Dismiss Adversary Proceeding, dated August 24, 1984.

The Court determines that it must now make a "fresh determination of the mortgage question," to

resolve finally the ownership interests in the Silversword Inn. The Court therefor vacates *sua sponte* the portion of its August 24, 1984 Order that dismissed adversary proceedings 72-391(3) and 72-391(4). (These adversary proceedings were the subject of appeal No 81-4081 in *Matter of Ellis*. 674 F.2d at 1239.) The Court sets a Hearing to Determine Property Interests in the Silversword Inn for June 8, 1988. The May 5, 1988 hearing on the Motion for Order Authorizing the Listing of Property for Sale and the Sale of Property Free and Clear of Liens and Other Interests will be continued until an appropriate time after the June 8, 1988 hearing.

It is so ordered.

DATED: Honolulu, Hawaii, April 7, 1988.

/s/ Martin Pence
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

In re	BANKRUPTCY NO. 84-00371
LILLIAN HAGOPIAN COREY, <i>Debtor,</i>	
LILLIAN HAGOPIAN COREY, <i>Plaintiff,</i>	ADV. PRO. NO. 85-0185
vs. KULALANI, LTD., <i>et al.,</i> <i>Defendants,</i>	

— Filed April 22, 1988

Entered on Docket April 22, 1988

ORDER CLARIFYING ORDER CONTINUING HEARING, ETC

On April 7, 1988, the court issued its Order Continuing Hearing on Motion for Order Authorizing the Listing of Property for Sale, Etc. In that order, the court vacated *sua sponte* the portion of its August 24, 1984 order that dismissed adversary proceedings 72-391(3) and 72-391(4).

Mr. James Duca, counsel for debtor Corey in this action, has raised concerns over possible procedural defects in the court's *sua sponte* vacating its prior order. Letter from James Duca to Judge Pence, April 13, 1988. The court appreciates counsel crying wolf, when there is a wolf; here, there was no wolf.

A district court has the power to vacate *sua sponte*, i.e., on its own motion, one of its previous orders under Fed. R. Civ. Pro. 60(b). E.g., *Burnam v. Amoco Container Co.*, 738 F.2d 1230, 1232 (11th Cir. 1984);

Simer v. Rios, 661 F.2d 655, 663 n.18 (7th Cir. 1981) (citations omitted), *cert. denied*, 456 U.S. 917 (1982); *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 n.2 (2d Cir. 1977) (citations omitted), *cert. denied*, 434 U.S. 1014 (1978); *United States v. Jacobs*, 298 F.2d 469 (4th Cir. 1981) (citations omitted). See generally 6A J. Moore, *Moore's Federal Practice* 59.12[4], at 59-293, 59-294 & n.5 (1987). Thus, the court did not err procedurally in vacating *sua sponte* its order under rule 60(b)(6).

Moreover, the court's action under Rule 60(b)(6) was appropriate because "extraordinary circumstances" existed. See *United States v. Sparks* 685 F.2d 1128, 1130 (9th Cir. 1982) (to obtain relief under Rule 60(b)(6) "extraordinary circumstances" must exist) (citing *Ackerman v. United States*, 340 U.S. 193, 199 (1940); other citations omitted). This litigation involving Mrs. Corey's property interest in the Silver-sword Inn began in 1972. See *Matter of Ellis* 674 F.2d 1238 (9th Cir. 1982). This issue still has not been resolved, and it must be resolved to bring an end to this aged bankruptcy case.

In addition, the court's action is appropriate because Rule 60(b)(1)-(5) was inapplicable. See *Corex Corp v. United States*, 638 F.2d 119, 121 (9th Cir. 1981) (citing *Klaprott v. United States*, 335 U.S. 601 (1949)) (relief can be had under Rule 60(b)(6) only for reasons other than those enumerated in Rule 60(b)(1)-(5)).

The restrictions the Ninth Circuit has imposed on a district court's power under Rule 60(b) also do not apply. See *Craig v. M/V Peacock on Complaint of Edwards*, 760 F.2d 953, 955 n.1 (9th Cir. 1985) (while appeal is pending a trial court lacks jurisdiction to enter an order under Rule 60(b)). In this case, no

appeal was pending when the court vacated its order dismissing adversary proceedings 72-391(3) and 72-391(4).

Finally, to the extent that the Order was unclear regarding its vacating its prior order, the court clarifies it as follows:

the court vacates its prior order *only* to the extent required to determine if Mrs. Corey holds the Silversword Inn in fee or only as a mortgagee. The court will not entertain any motions not directly related to the determination of this issue. Therefore, all complaints, answers, and other pleadings in adversary proceedings 72-391(3) and 72-391(4) that do not directly involve whether Mrs. Corey is a fee owner or mortgagee are *not* revived. At the June 8, 1988 hearing the court will determine whether Mrs. Corey is a fee owner or mortgagee of the Silversword Inn.

IT IS SO ORDERED

DATED: Honolulu, Hawaii, April 21, 1988.

/s/ Martin Pence
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re	BANKRUPTCY NO. 84-00371
LILLIAN HAGOPIAN COREY, <i>Debtor,</i>	
LILLIAN HAGOPIAN COREY, <i>Plaintiff,</i>	ADV. PRO. NO. 85-0185
vs. KULALANI, LTD., <i>et al.,</i> <i>Defendants,</i>	
In the Matter of WILLIAM S. ELLIS, JR., <i>Debtor.</i>	BANKRUPTCY NOS. 72-391(3) AND 72-391(4) (Consolidated)
and HELEN B. RYAN, etc., <i>et al.</i> <i>Plaintiffs,</i>	
vs. LILLIAN H. COREY, <i>et al.,</i> <i>Defendants,</i>	
and HERBERT H.K. LOUI, <i>et ux.,</i> <i>Defendants,</i>	
vs. KULALANI, LTD., etc., <i>Additional Counter- claim Defendant.</i>	

Hearing Date June 24, 1988

TRANSCRIPT OF ORAL FINDINGS OF FACT AND DECISION UPON TRIAL OF TITLE

THE COURT: Let the record show that all parties and counsel are here this morning.

In the oral decision which I am about to make, I am giving some of this another [a rather] broad brush. I will as much as possible try to make the definition of my findings of fact and conclusions of law as precise as possible. But I will ask for a findings of fact and conclusions of law to be supplied by someone hereafter.

This matter comes back to this Court out of the Ninth Circuit case of *Ellis, In the Matter of Ellis*, 674 F.2d 1238 (1982). Here it is 1988. This entire matter started back in 1970.

In 1970 when William S. Ellis, after acquiring the Silversword Inn on Maui from a corporation in which he held I think controlling interest, went into bankruptcy in bankruptcy court of this district.

On the day before the Silversword Inn property - that's Lots 2 and 4 - were to be sold at a public auction for failure on the part of Ellis to pay up his obligation to his lenders, so we find on the day of the sale, August 21, 1970, Ellis asks Lillian Corey to be present and to bid at the sale. To be sure it happened on the day before in an endeavor to stop the sale, Ellis had filed in bankruptcy and at the time of the sale when he presented the order of stay to Chaney, it was authorized to sell the property. But Chaney proceeded to go ahead with the sale, and Ellis, in double protection of his own interest, had Corey there.

Corey at the time was in the midst of a divorce proceeding with her husband Ralph who was a lawyer.

There had been fights in the divorce action over who was entitled to what property and property in whose name. The fight is continuing now to this day.

But because Corey is now claiming that he owned the part and parcel of whatever interest, if any, Lillian Corey has in the Silversword property, no question about it, Lillian Corey was there only because Ellis asked her to be. She bid only because Ellis asked her to bid. She was there because Ellis, after having been a paralegalist in her husband's office, had apparently developed a family relationship, friendship between the Coreys and Ellis.

And during the time of stress of the divorce, Lillian Corey had discussed her problems with Ellis and Ellis had been very sympathetic and had given her never advice, just discussed matters with her. I said never advised because Ellis insisted upon that many times during this hearing before this Court that he never gave advice. He is not a lawyer.

Ellis purportedly bought the Silversword for 187 odd dollars. It had been appraised thereafter at \$140,000 by an appraiser. The upset price was \$120,000. Nobody bid the upset price.

Chaney went ahead with the sale. There was another bidder there. And urged on by Ellis, Lillian Corey outbid the other bidder and bid 8,000 -- I mean \$85,500 for the property.

She presented her own personal check because August 21 of 1970 was a State holiday, Admission Day, and followed it up on the following Monday. That was a Friday. The following Monday, Corey followed it up with a cashier's check which she gave to Chaney in lieu of her own personal check.

Corey thought that she had bought this property at

that execution sale. You look at all of the exhibits, you find that she didn't buy it at that execution sale, that the execution sale was set aside on the insistence of Ellis in the bankruptcy court. And it was held by the bankruptcy court.

But Ellis proceeded to take the same amount that she had bid, proceeded to use that amount to effect an arrangement in his bankruptcy case and gave to her a deed to the property. Touch upon that a little bit more.

And the deed which is the bottom of all of this problem, because it was a deed outright on its face but with a little kicker inside, a little kicker, a little hook, a little hook inside that said it was subject to an option to repurchase. And he gave her the option to repurchase.

Unquestionably, in this Court's mind, after listening to all the evidence, and I will touch upon it more fully later, Lillian Corey thought that she had bought the fee simple of this piece of property. The deed that she got she thought unquestionably gave her full title to it.

She also thought all the time that the deed -- that she was entitled to buy, purchase that piece of property at that auction sale. That statement there is born out by this communication -- bear with me -- dated 1977. Honolulu, 10-22-1977, WSE Exhibit 16.

Dear Lil. During our phone conversation today I agreed to provide a brief narrative of the account of the circumstances of the purchase of Silversword Inn by Bessy Hagopian. Although you bid at an auction -- to add on, those proceedings were Chapter 11 proceedings. And if the federal bankruptcy court resulting in voluntarily by warranty deed subject to lease of repurchase option.

And then he encloses pertinent papers, handwritten

index and shows how the conveyance to Bessy was made in exchange pursuant to item 10, judicially approved by item 14, mortgages voluntarily released funds disbursed to the bankruptcy court. In other words, in 1977 he was still forced to try to convince Lillian Corey that she never bought this property at the execution sale.

Now, in order to understand what really took place here you have to analyze the character, the education, the background of the two parties.

Exhibit T 23, the resume of William S. Ellis, Jr., born in 1923. So today, not yet quite, he is 65. He is now 65. He will be -- 64 now.

He had a BA in Business Administration from Washington State University. He attended Boston University, University of Washington and Northwestern University. And on February 4, 1987 it says that his present employment is a subdivider of Maui property. He has four -- three projects that he is presently working on.

He says that he is government liaison for the subdividing and planning process of certain projects. He is president of Wai'Aina doing business as Hawaii Water and Land Consultants and that he is a licensed real estate broker, independent, and that he had subdividing experience.

In 1959 he subdivided about 49 acres, 6 lots, and subsequent resubdivision and consolidation on all of those. Kulamanu, 55 acres, 1960, urban, and negotiated and goes to list all that for subdivision of Lot 182 of that five acres to five large lots.

Then Ainakula project, that's 1960, four acres, urban developed, so forth. Duplex, single family et cetera. Kulalani project, 1977, two lots in Kula

Orchards, about three acres, and so forth. Olinda Farm Lots, 1959 to 1960, 125 acres. Twenty-six acres, unit A, two-acre minimum units, five-acre minimum, so forth.

And then water land consulting experience, '56 to '83. And you run down there, drafted this flood control statute amendment irrigation and so forth, publication on Kula irrigation feasibility study. Molokai water plan, collaborated in study, revised plan to study of 1.6 million.

I am just jumping along.

The Board of Water Supply of the City and County of Honolulu, he had to do some admissible [municipal] water use plan. We go back to that, how he had publishing experience. Managing editor, University of Hawaii press, so forth, '54 to '60. Random Printing Company, produced own publication.

And '53 to '57, Executive Secretary of Hawaii Farm Bureau and so forth. And '56 to '57, employed by the Attorney General on a one-year contract to research and draft amended statute to revitalize the Farm Loan Board. And the amended statute was characterized -- this is his own words -- as best in the nation at the national convention. And he has organized and managed corporations and partnerships for family and associates.

In addition to that, by his own statement, he acted as a paralegalist for Ralph Corey, an attorney, for some time back in the '70s, '60s; '60s and '70s.

Almost all -- I think almost all -- of the documents that have been filed in this entire transaction were drafted by or, as he would say, if he didn't say he drafted it, he would say he, well, with some other attorney, Mr. Corey or someone like that. But it is

clear to this Court he himself was the one who advised the attorney, although he never gives advice, and he was the one who chose the words on practically each and every one of the documents in which he had any hand in at all. And he had his hand in most of them, if not all. He was the one who was the author, basic author, of each and every one of the pertinent instruments filed in this case.

As he said, he had been involved in lawsuits since 1962, about thirty-five lawsuits involving land, land problems, deeds, mortgages. In thirty-four he had appeared pro se. He appeared pro se not only in this Court back in about the early '60s but in different matters, but he appeared pro se in this matter. The other is *In re The Matter of Ellis* before the Court of Appeals. And he said he appeared before the Court of Appeals twenty times pro se and had been before the Supreme Court of Hawaii.

See, he said the Supreme Court. I was unsure whether he meant the United States Supreme Court or the Supreme Court of Hawaii. So I construed it as being at least 15 times before, quote, some Supreme Court. I believe the Supreme Court of Hawaii. But he cut that back to 14 times by further statements.

And he said that he had assisted in drafting four sections of HRS 1956, 1956 and 57, concerning the Farm Loan Board. That's the one that's the best in the nation.

And I was, if I was a party, he said, I drafted other than those involving Silversword and with other problems, probably around 40 deeds, instruments, mortgages, and so forth.

He considered himself a skilled draftsman. Then he goes ahead and says but Mrs. Corey participated in

drafting of the instruments in which she was involved.

Well, you may participated in the drafting by reading them after she got them. That characterizes, in this Court's firm belief, about all the assistance that she gave to any of the instruments.

So we find in Ellis an individual who was always been taking care of his own self and sure of his own ability to take care of himself, experienced in this field and who insisted not once, if many times, that he had read *Kawauchi versus Tabata* the State Supreme Court case on defeasible deeds, before ever he went to the auction, or I should say took Mrs. Ellis [sic] to the auction back there on August 21, 1970 when she thought that she bought at a public sale this property.

His knowledge of the law, his ability to use every bit of that knowledge as manifested throughout the exhibits, the history of this entire Silversword litigation.

You see, the way in which he transferred the interest in Silversword was back and forth, up and down, left and right to members of his family and associates. See, it transferred to corporations, each and every one, a sham corporation, a shell corporation, a straw corporation, \$1,000, transferring property for \$10 and the assumption of all of the debts of the prior corporation or the prior individual as it might be. No money, no new corporation; just a new name.

Each and every time you will find that Ellis was the one that was signing either for the corporation as one of the officers or secretaries or with full authority, et cetera. And the corporations left and right and up and down went to members of his family.

They do not appear to have done anything except sign what he gave them at any time. They got nothing out of

it except this is part and parcel of Ellis' intent to keep the Silversword Inn. And he kept it for his wife to rent, for his son to rent it for a time and for his daughter and for his family. And even the last was he put it into a nonprofit trust I think it is. But we will touch upon that. The last being the latest, most recent transfer of the property.

Going back to when he purchased it, \$187,000, he purchased it from a corporation which he ran, as I said, before, that which he had majority interest. I don't know if he paid \$187,000 for it. Maybe the records shows it, but I don't remember.

But I do know that the time that he took Corey there to buy them he was looking everywhere for money to keep the property from being sold. And he knew Corey had money, Lillian Corey, because he was familiar with it and the property that they had severally or jointly acquired when they were married.

On the other hand, take a look now at Lillian Corey. She is now almost 83. In 1971 she was 66. She is a retired school teacher married, of course, to a lawyer, as I said, between '68 and '73, for five years.

She was involved in a divorce hassle and settlement of property with her husband. She is intelligent but absolutely unsophisticated in the area of deeds and mortgages. She never lent money, never took a mortgage as the mortgagee of any property. She is unsophisticated in real property law, unsophisticated in litigation until she got into the divorce and then subsequently into the present litigation.

She is definitely not a schemer. And I must say that the record is clear that Ellis was always scheming to see how he could maintain and keep Silversword Inn and how he could get as much money as he could from

Lillian Corey.

She is very gullible. She is not stupid, but she is gillible. She is familiar with deeds in the sense that the property she owns is fee simple. And she is also impulsive.

In this hearing and the present bankruptcy, two times she dumped her attorney. Didn't have any attorney because she didn't understand what was going on and she didn't think her attorney was doing what she thought maybe he should be doing. And as the record shows during the period in which she was in the litigation in the beginning with the Louis back there in late '70s and '80s and thereafter, attorney after attorney -- we will touch upon that later as to whether she dumped him or whether Ellis dumped them for her.

Change the word dump to dropped.

She is also clearly very supportive of those, very supportive of those she considers her friends. And she relies upon what her friends tell her. And it is clear that she will yield under pressure, whether it is done by pressure that comes from this Court as it did when she wanted to get rid of her present attorney on two occasions or as she did when she talked to Judge Lum before he was a justice in the divorce matter or pressure from Ellis as she did many times in this case here. She yielded.

She was never a lender. She was an investor in houses, apartments. But I think there is only one major exception. She relied in all of her transactions with the Silversword Inn property upon representations and directions, not advice, of course, but the direction of Ellis.

There you have two parties here. One very sophisticated, one completely unsophisticated. One

always scheming any way to retain the Silversword property and the other relying upon the representations and directions of Ellis. Lillian relied upon him.

Now, let's go back two parties before us and see what happened here back in 1972.

I have indicated she thought she bought the property there. She brought out the evidence clear. She wrote out the check to Chaney whom she knew and he knew she had money. She was unaware of the fact that Ellis had served the nonjurisdiction and automatic stay of the lien enforcement upon Aaron M. Chaney and George Ezalo by mailing the same on September 3, 1970.

Well, September 3, time had already passed. But nevertheless Ellis -- he filed that in 1970 in the United States District Court. And he had with it on the notice that I am sure he must have given to Chaney there on the 21st because it starts out please take notice that the above named debtor filed on August 20, 1970 at 2 o'clock in the afternoon in the bankruptcy number 70-249 for a petition for real property arrangement under Chapter 11. And he filed notice of lis pendens and filed at the Bureau of Conveyances at 3:39 in the afternoon.

See, Ellis is an experienced man in this field. He knows what he is doing. And the property was subject to foreclosure sale pursuant to judgments and orders in civil 401, 402. But properties automatically stayed.

This is what he himself drafted. He signed it at the bottom, Rural Route 1, Box 469, Kula, North King Street. Then the notice of lis pendens, also filed there on the 20th of August, 3:39 p.m., are all set forth in the exhibits.

And then we find on T-6, again prepared by Ellis,

that November 16, 1970, he had an order disposing of the foreclosure sale held on August 21 filed and thereby authorized -- now, this is November -- authorizing Chaney and Ezaki to return the deposit check in the sum of \$8,550.

Now, who's check was that?

Lillian Corey's check. This is in November. She gave him that check on August 21 as is indicated by Exhibit 3. It is a check made out to George Ezaki and Aaron Chaney.

Shown thereon is the cashier's check she got for \$8,550. Also on there is some other checks. Very interesting. We will touch upon them later.

Then we see in October, WSE-16, Ellis is writing to her -- no, I am wrong. This is 1977 when he again is telling her that she never bought the property at that foreclosure sale.

With that Exhibit 16 he then has a whole group of enclosures setting forth, well, what happened to the property in the bankruptcy court and how he handled it.

And how did he take that money?

That Lillian Corey, well, he brought out he had had minimum contact with Bessy Hagopian and Lillian Corey testified it was all the way through her money.

And I am satisfied to find that it was her money and she was the one paying because she was right here and Bessy Hagopian wasn't. She said that she was paying.

And clearly down the line Ellis dealt with and gulled - g-u-l-l-e-d - gulled her. But he went ahead and said now he had \$85,000 -- pardon me -- \$85,500 back there in 1972 Lillian Corey had said she paid for. And he, as it is set forth in exhibit T-9, went ahead before Judge Tavares in Bankruptcy Matter 70-249 how he was going to pay off MDG Supply, Credit Associates,

Chaney and their respective counsel and so forth. And as he said, he was going to pay them, MDG Supply, et cetera, how he is going to pay them and he is going to have all together for that purpose, that class, the sum of \$85,500.

And Lillian Corey, as shown by the exhibits, was paying the money to him. He was paying them over to the bankruptcy court and depositing there in the bankruptcy court so that all of the creditors under his plan of reorganization would be happy. And that \$85,500 was Lillian Corey's.

She unquestionably thought at that time that she was paying because she had bought it at the execution sale. And it was, as shown on exhibit T-10, the application for order confirming unanimously accepted arrangement.

It is Ellis himself who prepared the application for order confirming unanimous accepted arrangement. It is Ellis himself who is stating at that time that the real property had been appraised by DeVault at \$140,000 and that the successful bidder at the sale conducted on the day after this proceeding, namely the bankrupt proceeding, was commenced. He sent to Bessy Hagopian on the purchase price of eighty-five five. And it was terminated, as I have indicated by the prior exhibit, on November 16 by the order.

But Lillian is paying the money in as requested by Ellis for that day. And so he goes on -- and this is the order -- that the debtor convey the subject property to Bessy Hagopian upon the payment in the registry of this court the balance of the purchase price of \$85,500, the balance of the \$85,500, and that the sale be subject to the existing lease of Silversword Corporation.

Then he puts that in the existing lease and that the

infancy the existing lease yield to the purchase a net return of 10 percent per annum after gross income taxes, after gross income taxes on our investment of 85,500.

Now, that isn't the way the instrument was drafted. Oh, it returned 10 percent. But it was not to be on her income taxes but on a net return of 10 percent per annum of after income taxes, whatever that means. But we will touch upon what the words of that instrument were and what they meant.

The subject to assignment repurchase option to the debtor to be exercised within two years after the conveyance providing for an additional income of five percent per annum to Bessy Hagopian upon repurchase by the debtor. And he acknowledges that by the time this is filed, January 21, 1971, he said Bessy Hagopian had deposited already \$41,000 with the registry of the Court.

Then he has what each one is to get and how it all total. That upon execution of the amended arrangement the following assumption [sums] will be disbursed from the registry of the Court to all of the creditors listed on page 3 of exhibit T-10. And it totals \$85,500, the same amount that Lillian Corey bid for that property.

We note on page 5 of that same exhibit is the comprised [compromised] sum -- that's a deed of \$29,925 -- shall be secured by pledge to creditor Smith of the debtor[s] option to repurchase the subject property.

Now, that comes in because it is how many years later that the same figure pops out. And we find that Lillian Corey is asked by Ellis -- pardon me -- is said -- she is asked can you give a check of \$29,000 --

pardon me -- \$30,000 to Ellis. He says it was for this. She said she didn't give it to him for that but that he made different representations and that's why she paid him.

We will touch upon that later. But that comes in there at that time.

And then he sets forth debts like this to Kala Development Corporation, 15,000; Ralph and Corey, 10,000; Silversword Corporation, 29,000. I say it is for those corporations. Ellis was running 55,000. And then he had certain other creditors, some \$29,500, to be applied against the rent, Silversword Corporation, 8,261.

In other words, money was to be held out in the rent in order to pay off Ellis' debt to Silversword Corporation. That's the lease rent.

And I notice that your application [applicant -- Ellis] was manager of his dissolved grantor. That was the corporation that he got, corporation that he ran. And he said that he acquired the property in 1968 for the purchase price of \$187,000 with the understanding of his grantor that any difference between the said purchase price and the lesser sum required to settle all indebtedness against his grantor and the subject property would be [in] satisfaction in goal of the service that which he had rendered to that corporation.

So that we see here and this Court so finds that the \$187,000 was a nice round figure. But the real amount of money which he actually put into it doesn't appear and neither does, as this Court recalls, the evidence. And he notices this one conveyance of the subject property by him to Bessy Hagopian, the repurchase option will be valued at \$101,000 in relation to your applicant's purchase price of \$187,000. He was

knocking off clearly almost \$86,000 or at 54,000, 2,500 in relation to Clair DeVault's appraisal of 140,000. So that the option is ample security for the \$925,000 [\$29,500] in claims assigned to him administered by creditor Smith.

In other words, clearly the price which she paid was not even on his own figuring out of line with the actual value of the property. And that, of course, that since all the creditors were happy, Ellis was happy.

That application was approved by Judge Tavares. As we find on November 16, this letter from Ellis to Corey with copies to Tavares and Ryan, Mrs. Helen Ryan, Hitchcock and Martin Luna, all attorneys, and T-15, the order to Judge Tavares from Judge Hawkins mailed to you yesterday labelled Mr. Chaney needs to return to you by authority of respective courts the \$8,500 deposit. The order by Judge Tavares sets up the authority to safeguard the deposit, 8,500 and that you deposited with the registrar of the U.S. District Court. Interest payments are from the lessee, not Ellis. From the lessees as provided compensate your money on deposit with the U.S. District Court until clear title can be conveyed. That's exhibit T-15.

And with that is a quote, deposit statement showing that on 8-24 8,550 deposited by Lilly [Bessie], via deposit Lillian H. Corey, and he has there agent. 8-24-70, 8,550. That check as clearly identified in Exhibit 3 was not the check of Bessy Hagopian. It was Lillian H. Corey.

Then on 12-1-72, 14,000; 12-9-70, 12,000; 12-15-75 14,000. \$40,000 total deposit as of December 31, 1970. And remit to Lillian H. Corey, agent by the Silversword Corporation. Interest, \$127.50 is on that \$8,500 computed at six percent. This was prepared,

signed and verified by -- I am quoting from Exhibit T-16 -- by William S. Ellis, Jr.

But before that, on November 24, by Exhibit No. T-19, we find this agreement to lease for payment of interim interest. This covers the same matter we are talking about recited there in our exhibits.

Lillian Corey, quote, as agent for Bessy Hagopian hereinafter called the purchaser. The purchaser, not mortgagee. Deposit with the commissioner the certified check and so forth at an auction sale. And Chaney had been ordered to return it. And whereas lessee, Silversword, Silversword had expressed its willingness and order for this Court to pay a fair and equitable return to Lillian Corey at six percent in consideration the sum of \$127.75 paid by the lessee to the purchaser.

I am emphasizing purchaser because this is all prepared by Ellis.

And in further consideration of the promise by the lessees, not Ellis who got the money or the benefit of it, to pay the purchaser monthly interest on the said sum of \$8,550, depositing, so forth, until the time the said premises are conveyed to the debtor by -- conveyed by the debtor -- that's Ellis -- to the purchaser pursuant to the amended real property arrangement and so forth in consideration of the debtor's consent to such payment by the lessees. Oh, he was generous. He was consenting to the payment by the lessee to the purchaser in lieu of the payment of the rent for the debtor.

Well, after the property is gone, sold, no rent should be due the debtor.

Ellis persistently always took care of Ellis first. And so it was agreed then now between the lender,

lessees and the purchaser that purchase of Lot 2 shall be subject to existing lease of the lessee. But here he puts it in providing, however, the monthly rental shall, the rent, shall be fixed at \$708.33 plus four percent tax for a total of 736.57. And provide further that all taxes, utilities, insurance, maintenance, both interior and exterior, shall be paid by the lessee, Silversword.

And who was Silversword? Family? Wife? Might say Ellis because Ellis ran it.

And that the lessee shall sublease the rest to the debtor. It may be Silversword subleased the residence to the debtor for \$1 and purchase the Lot 4 subject to a new lease to the debtor and at an annual lease of \$25 plus four percent tax for a total of \$26.

The purchase of Lot 4 shall be subject to a new lease to Ellis for \$25 semiannual rent, \$56 a year. And it is signed William S. Ellis, debtor. Bessy Hagopian signed, Lillian H. Corey signed down below. Lillian H. Corey, her agent. That's Bessy Hagopian signed it and printed it in.

Then we find on November 21 a supplemental lease agreement signed between Ellis and Silversword Corporation. And it recites in there creditor, Silversword Corporation, hereinafter called the lessee, title Lot 2 is invested [vested] in William Ellis, Jr. Lot 2 is to be conveyed to Bessy Hagopian subject to the option to repurchase. All of this is set forth in this Exhibit No. T-19.

Subject to repurchase, it is to be conveyed to Bessy Hagopian. Subject to option to repurchase for the debtor for the purpose of an amended real property arrangement and in consideration of the debtor's present interest, if he still owns it at times, in the Lot 2 and future interest as optionee.

The debtor, Silversword, agrees with the debtor--Ellis agrees with Silversword -- the effective lease rental for the six cottages, main building and linen room in the residence shall be concluded and he goes ahead 20 percent of the cottage rentals, 10 percent -- that's the lease rent -- 10 percent of the bar and sundry sale, 6 percent of the restaurant sale. And increased to 23 percent of the cottage rentals in excess of \$1,500; and increase to 12 percent of bar sales in excess of \$2,500; and increase to 8 percent of the restaurant sales in excess of \$6,000 from January 1, 1971, with a further jump to 25 percent of cottage rentals in excess of \$2,000; 15 percent of bar sales in excess of \$3,000 and 10 percent of the restaurant sale in excess of \$10,000 of January 1, 1972 and so on down the line. And it goes on down to minimum of 500 for the percentage rental as of January 2, '71 and 700 as of -- until July -- I don't know. Effective July 1. Oh, July 1. That's for six months. Then January 1, \$500 a month. July 1, '71, \$736 a month. July 1, '72, minimum of 1,000. And that the lessee pays the debtor the balance of any lease rental remaining after payments to Bessy Hagopian.

In other words, he sells the property. Well, he still owns it though on paper. Re-entered into a new lease. And he cuts himself in for all these increases.

What does he give them in return?

Well, he didn't have to. William S. Ellis, debtor, Silversword Corporation, were in all practical effects one in the same. But if the amount of percentage should not be sufficient, full amount of Bessy Hagopian, lessee, has to pay that.

As I said earlier, say it again, he was a shrewd, very, very fine legal writing and always, in making

decisions. This court determines the Hagopian factor was the factor that motivated his decision.

What did it mean to him? Never mind logic or reason.

Then we find January 22, 1971, that Judge Tavares confirmed Ellis' property arrangement in the bankruptcy matter. That's T-11. And T-12, Ellis applies for final decree discharging him as debtor in the case.

T-13, we find the warrantee deed, warrantee deed dated 1st of March, 1971. We find the deed. And on the same day we find an option to consent to pledge an assignment thereof.

T-14. Let's take a look at the deed. It says the grantor, sum of \$85,500 deposited by Betty Hagopian and so forth. The debtor, Ellis, does hereby grant, convey and the grantee or heirs assigned pursuant to the authority granted by Chapter 12 this particular parcel of property to have and to hold, so forth like that. And he says he is fee simple, got the right to sell the same and just an ordinary form of deed, except for the fine print.

I put it that way because it is set forth as part and parcel of the description of the property in a different type from the rest of the deed.

Being parcel of land conveyed to the grantor by Diversified Investments and recorded and subject to said Lot 2. Dated March 3, 1969. And then subject further to that certain option with even the date given by the grantee to grantor to repurchase said Lots 2 and 4. That's the fine print. The rest of it on its face, no question about that.

But who put that in?

Corey never put that in. Corey was gulled. I will

repeat again. G-u-l-l-e-d. Corey was gulled into giving him an option, gulled on the basis that you want me to have a chance some day to own it again. My wife is there. I am putting these words in because there is no evidence of exactly what was said at that time. But we know that she gave him the option to repurchase, price set forth therein. And she herself testified because of the way in which she thought he was her friend, she had helped him.

Now, she testified, "I went into this to help Bill." And then she goes on and says I put in 141,000 and I want it back. I could have gotten 20 percent interest during the day in which the interest was very high in the '80's. I wanted to help him. He would help me.

Now, one can say more clearly she intended that she wanted to help him to get it back. And, therefore, under Kawauchi it is obvious that this is a defeasible deed.

I will touch on that later as to what the law is as this Court sees it on Kawauchi.

But if you would hang your had upon that one statement of hers only, you would say oh, yes, she clearly intended just to lend him the money so he could get it back.

But this Court finds that that was not her intent at all insofar as what she thought she bought. Unquestionably the Court finds that she thought she bought this property at a sale and that she owned the property and she gave him the option to buy it back so that if he had the money, out of her feeling of obligation to him, he could have it back.

I say again, as shown by again referring to WSE-16 where he writes 10-22-77. Although you bid at the

auction, those procedures were terminated in favor of a Chapter 12, proceedings in Federal Bankruptcy Court resulting in a voluntary conveyance by warrantee deed subject to lease and repurchase option. And she was still thinking in 1977, this Court so finds, that she bought the property at that sale. That's why the 85,500 came in.

Now, everything is all set. What is she getting?

Well, she got more problems. Because right away March of '71, as indicated by T-14, wherein it contemplates the conveyance the subject real property to the purchaser, purchaser of the amended real property arrangement under Chapter 12.

The parties entered into an unrecorded sale and purchase agreement dated November 25, 1970 and parcel exchange arrangement. Purchaser has purchased from the seller by warrantee deed, purchase from the seller and simply that she is going to agree that she gives to the seller an exclusive option for a period of two years and purchaser all of the interest in Lot 2 for \$85,500 plus 5 percent per annum from the date hereof. That is the consideration for the option.

And all of the interest in Lot 4 for the sum of \$1,000 plus five percent thereof, the date hereof. And then the purchaser consents to the pledge of the option to Quentin Smith. In order to fulfill the arrangement, he was the trustee for the credit, stockholders of Diversified Investments. We discussed what Diversified Investments actually amounted to.

Nowhere is there even the slightest indication in any of those documents there that there was anything but a straight common ordinary garden variety of deed with an ordinary garden variety of option to repurchase. Nothing in there to indicate on its face

that there was a defeasible deed.

And certainly this Court is absolutely convinced from all of the testimony here in court, after having observed the parties, that Lillian Corey never dreamed that she had anything but a fee simple property right in that property. I note here on April 3, '71, Dear Mrs. Corey, from Bill Ellis. Enclosed is the original title certificate with respect to the two parcels conveyed to Bessy Hagopian, et cetera.

Then we note May 13, the assignment of option. And here is William Ellis, prepared by him, whose address is RR 1, Box 469, Kula, which is the same exact address as William S. Ellis, Jr., and transferred to George Blechta, Jr., as trustee, notice trustee, under that certain declaration of trust dated 13th day of May, 1971, all of this interest in the option. And being subject to a pledge by William S. Ellis, to Quentin Smith -- we discussed that -- \$29,900 some odd dollars.

Now, who was Blechta? Blechta was the boyfriend of Ellis' daughter. Another one of the sham transactions, the straw transactions entered into by Ellis.

On June 14, 1971 -- Now that other one was May 13. So a little bit of time has passed. Thirteen, fourteen, a month. Here is Blechta. For \$10 assigns all of Blechta's right and interest in the option. Consent to pledge and assignment was referred to and so forth as trustee to have and to hold, et cetera. And Blechta signs it. And it was all prepared by -- no question about it -- Ellis. And the recordation was requested by Upland Investments.

And who are Upland Investments? Ellis. Another one of his corporations. As we see from September 21 of that same year in the letter from Ellis -- no, from

Blechta. Pardon me. From Blechta.

By this time he was out of the picture. But, nevertheless, he was not -- wasn't out of the picture. He was back out. I see he is now signing as vice president of Upland Investments. I notice this is on the same typewriter that Mr. Ellis has been using for the other instruments.

Enclosed is a copy of the assignment of option. I am not sure it's on the same typewriter, but it appears. That's a non-critical inference.

Enclosed is a copy of the assignment option to Upland Investment. He is telling what has already been done.

And then something very interesting. My parents are visiting this summer. That's Blechta's parents. And he expressed an interest in backing the operation. However, they expressed some misgivings about the option status and prefer a much more orthodox title situation. For the first time -- first time there is recognized that there may be -- Pardon me. I ought to withdraw that statement entirely. I will just go ahead.

Therefore, we would very much appreciate your consideration and acceptance of the following offer. The option would be exercised -- option to repurchase would be exercised by Upland Investments. That's Ellis. And by that date, the five percent interest would be on -- 85 would be 2,479.17. So the price would be 87,479.17. Plus the increment of 354.17 per month. That's five percent on 85,000 until paid. Down payment would be 2,479.17. Namely, the interest. Leaving a balance of 85,000 plus five percent interest be secured by first mortgage note. No cash other than \$2,479. Interest on the note is ten percent per annum

payable monthly. Principle payable on or about October 1, 1973. The present lease for the Silversword Corporation to be amended subject to mortgage Upland assigned to your sister. This is, of course, Hagopian. The name is still on. Yet the portion sufficient to cover the interest payment, that portion of the rents sufficient to cover the interest payments as under the present arrangement.

This is the artful language of Ellis. He is transferring what was originally indicated as rent. Now it is just interest which you are getting. Not rent. That's what he is saying.

Mr. Ellis is authorized by the Corporation to act as the intermediary to expedite the transaction. He will contact you by phone.

That was on September 21. It is not until November 12, Dear George. And he is talking about he is -- he says, in his promotion, in a mode of carrying on his subdivisions and deals. When the transaction had been fully consummated, Upland will have Mulligan note from Silversword to cancel out against that third item. That is the effective commitment to Whitney is about \$7,000. Balance owed on the note he will assign to Upland. That's about it. About the same as third item of advance lease rental in October 26 minutes -- I don't know what those are -- of the Upland Corporation.

When the transaction is fully consummated, Upland will cancel out against that third item. Payment by Upland in the amount of purchase price of \$2,489 from 36 is to Silversword Inn. The round robin effect.

Now, I do not know what the personal circumstances might be except still that the divorce of Lillian and Ralph had not been completed. But the personal service and great assistance rendered at a critical

time, I feel that only fair to abide by their request to let the transaction continue in its present format. The main problem is lost depreciation. Until Upland, who had the title, they had to have -- not the title. Had the right for option until Upland needs it for tax shelter. There is no problem.

This is very interesting. We will get to timing and commenting on the Silversword profit and loss when the Whitney workload is accomplished. That's the debtor, Whitney. Net flow 5,000 a month on present contract while servicing the Whitney obligation. This result from him including unit E income. Also might achieve a paper product [profit] of so much on unit E, not some of these subdivisions, to absorb the overhead and dispense with our option format.

And notice what I read a few moments before that out of Exhibit WSE-14? I feel it is only fair to abide by their request, Lillian and Bessy, question mark, to let the transaction continue in its present format. Down below, enable to dispense with our, quote, option format.

Then we come to March 11, 1972, Exhibit 5. And this is to Bessy Hagopian, care of Lillian Corey. The divorce is still not concluded, the Corey divorce. And he states here you received interest to January and February of '71. You received interest on the funds deposited from the federal court register. And he outlines the amount of money that the periods cover. And the amount for January 20 to 12-31-70 -- that's what I see here. February 1, that's a payment date. Oh, I see.

Payment date is January 20. And he covered the period from 12-30 up to 12-31-70. February 1 covered the period to 1-15. February 8 covered the period to 1-

31-71. And February 23, the payment date, 2-15-71. And March 8 with a payment date of this interest coverage to 2-28-71. Total of \$1,033.06 that Bessy Hagopian slash William Corey. Although I would drop Bessy Hagopian from this picture.

From March 1, '71 -- now this is Ellis writing to Lillian Corey. From March 1, '71 when title to the said premises was transferred to you, income was rent plus four percent tax thereon. Clearly he intended thereby to tell Lillian Corey that she ws getting rent on the property that she purchased.

Then, considering my cost and depreciation, February 28, 1971 for the building on the premises, your acquisition cost is tabulated below. Also included in the tabulation are the suggested depreciable in the 1971 depreciation. And he lists, therefore, your cost. This is her cost and he is breaking it down. He himself is fixing these figures as to what her \$85,500 bought. And the 500 purchase price of this Lot brings a total of eighty-five five. And he lists the depreciation in 1971 and the life of years. Be everything on that Exhibit No. 5 signed by Bill Ellis under the date of March 11, 1972.

It could be read by anyone only as saying that you, Lillian Corey, bought that piece of property for \$85,000, you are getting rent thereon. And you take all the depreciation on all of the buildings, here is the value of everything. Here is the depreciation that you can take.

This is in the face of his statement. When he drew it he knew that he was drawing the defeasible instrument. He drew it with the clear and obvious intent to deceive. And I so find to deceive Lillian Corey in the belief that she had bought the premises.

Now we go to 1973. And he is still playing his format, using his format to keep the property. And we see on Exhibit T-18 he has Bessy Hagopian on an option extension and consent to assignment of lease. Bessy Hagopian hereby extends from December 31, 1973, up to and including December 31, 1975, the time with which to exercise that certain option grant to Ellis as extended of the instrument dated February 28, 1973 and recorded to purchase the following described property.

Now, get this. And it was to purchase that property in which the one we are talking about, Lots 2 and 4, provided, however, this was drawn by Ellis. And we noticed that recordation requested by Upland Investment, Ltd. And Upland Investment's address is RR 1, Box 469, Kula, Hawaii, which is also the box referred to before. It would be the same box as William Ellis.

Now here is where he is moving ahead in his plan, scheme, intent to bring the deed of 1972 more squarely under the format of Kawauchi versus Tabata. And he says now here you are going to get -- I want the extension consent assignment of lease. Said that the lease rental -- he is talking about lease rental. He doesn't talk about interest. Lease rental has been paid through December, 1972.

Now, this happens to be in June, '73. And that payment of the lease rental from January, '73, through December 31, '75, shall be made to Upland Investments. It wasn't going to be made to her. But in view of the lease rental and the implement [increment] of five percent per annum or the respective purchase price, the interim [increment] shall be 20 percent per annum from January 1, '73, giving her -- taking away the monthly rental from the lease and giving it to

Upland investments, which he is giving it to himself. And then giving Lillian Corey 20 percent increase, running right into the usury problem of Kawauchi versus Tabata.

And at 20 percent per annum, the term on the lease in Lot 2 is extended from '73 to December 31, '75, in the event that the purchase option should not be exercised. And any sums expended by Bessy Hagopian for improvement of the premises together with an increment of 20 percent per annum thereon. So the purchase price of that lot.

And then he said the \$5,000 loaned by Bessy Hagopian on June 30, 1972 loan, together with interest of 12 percent shall be repaid before the exercise of the option.

All the way through he was promising the world and delivering nothing by way of cash to Lillian Corey. He was diversing [diverting] all the cash, as is indicated by this, at every opportunity to himself. And by this particular instrument, he, as part of his plan to make sure if at all possible that instrument, before it could be a deed and option, was going to follow the Hawaii court case of Kawauchi versus Tabata. He was setting it up. And it was he, with his expertise, was dealing with one who knew nothing of the implications, knew nothing of the implication that might follow from this particular exhibit, from this particular transaction as indicated by this exhibit. And Bessy Hagopian merely consents to the extension of the lease and so on.

T-18 clearly shows the scheming mind of Ellis with operating in high gear all to the detriment of Lillian Corey who trusted him, who relied upon him and thought of him as her close friend. And no doubt he

was, except where his own interests were involved. Then he was a much better friend to himself.

Then we have a deed of July 1, 1973, signed by Bessy Hagopian prepared apparently by Ellis. And it says in its granting clause and the grantor, Bessy Hagopian, hereby covenants with the grantee that she has lawfully seized in fee simple of the above entitled premises and has a good right to sell and convey the same, that they are free and clear of all encumbrance except the real property taxes.

That tax comes into it because we find that the taxes weren't being paid by the lessee as set forth in that lease. And here it was Corey who was being called upon not only to pay the taxes, but called upon to pay for improvements, to pay for repairs.

Is that what a mortgagee that is expected to assume under a mortgage and who is calling upon her -- Ellis -- to pay those?

As another indication of what was intended by the parties by that deed back there in 1971, take a look at Exhibit No. 7 when on 1-3-77 Ellis bought Lot 4. That's the small corner lot for \$2,000. Here is Corey filing in her income tax return for 1977 that she received \$2,000 for that lot, that its cost was \$500 and she was paying capital gains of \$1,500, paying interest on capital gain. Pardon me. Paying tax on capital gain for \$1,500.

She unquestionably thought from the beginning until everything blew up in '77, '76 and '77, that she had bought the property.

I notice here in '75 refers -- I referred to it before. But September 14, here is Ellis sending a copy of two receipts for permit to Upland for maintenance to the premises for Silversword and for payment of real

property taxes. You will note 12-31-74 received. Item 2 is for advance of repairs and maintenance.

Records of Upland indicate that this advance was applied to repairs in advance. This advance was applied to maintenance during the year 1975. In other words, he was getting money from her ahead of time for the repairs that was going to go through in 1975, repairs and maintenance. She was paying the taxes because Ellis wasn't and Silversword wasn't.

I also note -- No, I can't because this is part of the report schedule for depreciation claim as Exhibit 8.

Did I admit Exhibit 8 into evidence?

CLERK: No, Your Honor?

THE COURT: I am not referring to it. It is the one that talks about -- shows it in '77, certain depreciations, et cetera. I didn't allow it in because I wanted the full tax report.

MR. DUCA: Your Honor, you did admit into evidence the complete copy of the 1977 tax return.

THE COURT: Had that been filed?

MR. DUCA: It is 1 or 12.

MRS. RYAN: If Your Honor please, those were not copies of the '77 income tax, as I recall. They were '87 and '88. Or I am sorry. '87.

THE COURT: Well, I noted it says 1977 form at the top. It might be 1988 or '87 or '86. I don't know.

Would you wish to make a representation?

Well, we will take a five-minute recess. Again, what was the number of that?

In Exhibit 12 under the schedule for depreciation, which is reflected in what was marked Exhibit 8 but which was not admitted into evidence simply as Exhibit 8, the same being the tax returns of Lillian H Corey for 1987.

We note that she had kept track of the items of depreciation, cost, Silversword salary, residence, furniture, advances, improvements; advances that she had made and set forth in there and the amount she was depreciating in 1987.

All of this indicates what I said many times before, that Lillian Corey thought that she bought the fee. She never dreamed that it would be translated into that she had simply acquired a mortgage to the premises.

In 1976 we find in the option extension made 31st of December, 1975, between Lillian H. Corey, now unmarried, and Upland Investments, another name for Ellis. And in it, on Exhibit 2-A is a recitation. It says that Ellis, by deed, recorded and conveyed Lots 2 and 5 at the consideration paid of \$85,000 for Lot 2 and \$57 for lot 4 and buyer granted an option to repurchase expiring March 1, '73, and that the seller, Ellis, had pledged the option to repurchase to Quentin Smith way back there in '71. '72; pardon me. '72.

But no, it wasn't. It was by an instrument dated March 5, 1971. I was wrong. It is 1971. And it is duly recorded and all is set forth in the settlement, in the property settlement approved by Judge Tavares for that \$29,975. Something like that, \$25. And that was for Smith to take care of certain creditors back there in 1970, '71.

And seller assigned the option to Blechta reciting the history of what had transpired. And Blechta [as]signed the option to Upland subject to the pledge to Smith. And then Corey loaned the sum to Upland July 1, '72, the sum of 5,000.

The buyer extended the repurchase options -- the buyer, that's Corey -- in '73 to December 31, 1975. And so that shows how the buyer that day had to have

been Betty Hagopian, in conveyed property to Corey in 1973 subject to repurchase option, subject to the pledge to Smith to the option of repurchase.

And Corey remits 3,000 to Upland to reimburse premises of Lot 2, reimbursement to premises on Lot 2. Corey remitted, paid back \$12,000 to Upland, reimbursement for repairs and maintenance of the premises and for real property taxes. And Blechta assigned the option to repurchase Lot 4 in 1974 and payment of the indebtedness secured by option pledged to Smith was extended December 31, 1975 back to 1975. And they can't find Smith. And so Anders was appointed to see Smith as the option to so that she on behalf of Smith could pay off all of those entitled thereto. And there is this statement. Corey remitted to Upland \$33,000 for seeing the indebtedness of seller's predecessors and interest.

What he is talking about there is that 289,900 [29,900] plus dollars which he was supposed to pay long before, long, five years before, four years before, to the pledgee, Smith, on behalf of Ellis' creditors back there in 1970.

And then the money that he got from Corey he paid off, that 29,000, and got the option free. Here was Corey following the direction of Ellis giving him more money to clear, quote, the title, unquote, but to pay off Ellis' debts.

Now, Corey, in the sum of \$10 paid like up -- and in further consideration mutual covenant agreement, extends the repurchase option Upland may purchase the above described Lot 2 together with all improvements by payment to Corey of \$246,000 in cash.

Now, what is to be drawn from that statement prepared by Ellis?

Corey owned the property. He was willing to pay \$246,000 for it at that time. I don't at the moment know exactly how much money. It is in here somewhere that she had already paid in. Certainly the money alone amounted to over \$140,000. No interest. Even by way of rent, no rent, if you want to call it interest, had been paid since back there in 1973. To use the vernacular, she was sucking wind all of this time. And the wind came from Ellis.

Anyhow, she says for \$10 she let him buy, exercise the option for 246,000 in cash. And that's lot 2. And lot 4, \$2,000. We know that Upland did pay \$2,000. We discussed that a moment ago. She listed it at capital gains.

And agreed the option shall not be pledged or assigned. The option shall not be extended before December 31. The purchase price will include repayment of the 25,000, repayment off the payments of 33,000.

In other words, he is not going to pay that. He is going to get all the benefits of all the money that she has already advanced. And event the option to purchase lot 2 should not be exercised and any obligation due Corey in consideration the loan of 5,000 and the remittance of 33,000 shall be extinguished. In other words, if we don't exercise the option, we don't have to pay you back any of these monies.

All that was to the advantage of the company not to be repaired. This is part of the way in which Ellis worked steadily and persistently to make sure that Ellis was taken care of and Corey, his friend, was left without repayment. And in the event Upland should exercise the option and should sell it, in excess of 492,000, now, 246, 492, roughly 100, \$200,000, \$200,000

difference.

But if, in other words, if Upland, that's Ellis, exercise the option and turns around and option for 246,000 and then he sells in more than 492, he makes 200,000 out of the deal, clean and clear, then any above that, give one half to Corey.

The same thing on Lot 2. If I buy that and sell it in excess of four, if I double my money, I make 2,000 net profit. Then I will share anything over that.

Then if the option to purchase should not be exercised before March 31, 1976, the lot shall be offered to sale commencing April 1, '76 in accordance with that certain listing agreement of even today set forth her.

In other words, we see Corey knowing that Ellis is living there, Mrs. Ellis is living there, the whole family is living there, Ellis is willing to sell the property. Wants to sell the property because she is not getting anything out of it. No rent, only talk about rent. She is paying for depreciation, she is paying for taxes because she has the sympathy, still thinks that Ellis is her friend, still thinks that wants to help out the Ellis family, she wants money. This is typical of the way Corey has operated. This is typical operation. She is an investor who wants return on her money out of the investment she makes. She is not a mortgagee.

And so now we turn to that -- one more. Not ready to turn quite yet. Because I have here exhibit T-2 which was filed December 22, 1975. Application to substitute pledgee verification agreement to serve successor trustee and to share fees.

This was addressed to Sam King. This may have been typed by Mrs. Ryan. I mean at her office. But

the content is pure Ellis. I know that Mrs. Ryan went through it but nevertheless the strong black line down through the middle is that of Ellis. And it is a recitation. And this is T-2 of same thing only this is in more detail of what happened back there in 1970 and '71. And how the money put up by Hagopian and Corey was used and how the option pledged to Smith, what it was to cover. And how Hagopian extended the option. And the Smith extended the option. No money. Just extension. And the aggregate due Smith.

Here is the figure. I have been saying to 32,927.50. But I thought -- yeah, that's right. It was -- What was it; 33,000, wasn't it, that she put up?

That's right. I said 30. I made a mistake.

Heretofore because it was 32,927.50. It was paid ultimately by Corey. I don't mean that Corey knew when she was paying it, because she was paying off that pledge. My understanding of the evidence is that she thought she was paying off for the improvements, taxes, and repairs. And how in this particular recitation Ellis is saying that he wants a substitute pledgee to discuss how Charlotte Anders being in and same recitation before Judge King.

Judge King signed the order, prepares it allowing Anders to take over. And here was the money paid in showing how Smith was finally contacted and how Angie was going to be paid something.

And in T-4 filed January 20, 1976, we find deposit pledgee's fee for remittance to Smith, the money put up, paid in. Not put out; paid in. But not necessarily. I don't think the evidence was it was for this purpose by Mrs. Corey.

And then by T-5 that option to pledge cancellation for assignment was filed. But I, dropping back to

Exhibit 2A, in the event -- the last paragraph 8, on page 5. In the event that Upland should exercise the option -- No. In the event -- this is number 8 -- event the option to purchase the lots should not be exercised on or about March 31, said lot should be offered for sale in accordance with that certain listing date incorporated herein by reference.

* * *

(Lunch recess taken.)

THE COURT: Just before the recess we discussed the matter of the issue of usury that came into this case by virtue of the Exhibit WSE 1, option extension, of 31st December, 1975. That was the first time that it appeared that Corey was to get a tremendous amount of money, the inference being that she only put in roughly 140. Here she was getting 246.

Now, that would make this instrument fall into the rough padding of the Kawauchi case. In the Kawauchi case the buyers, they went into the deal, got the deed with the express knowledge that they were buying it at a very low price, a price much less than it was worth in the market. And that if the seller, Kawauchi, didn't exercise his option, they clearly intended to make a big profit right then. They went into it with that expectation. And the court, Supreme Court, held that that was clearly indicated that they were expecting usury and went into the discourse on that and found out that under those circumstances it was defeasible deed. The Court notes that in the matter of Ellis, in 674 F2d, 1238, many times the court of Appeals talks about this being a defeasible deed indicating that on its face it was a defeasible deed.

But even though they said that in one place, this Court has previously discussed the matter in

discussion with counsel during argument, they nevertheless say that this Court must determine what was the intent of the parties, time that they executed this instrument. At the time it was executed, unquestionably, Ellis intended it to be a defeasible instrument. That was never understood by Corey. There was nothing at the time it was executed to indicate that this was going to be a great windfall to Corey, that she would be in effect getting great returns amounting to usury in the event that the option was not exercised.

To the contrary, by the terms that I have just gone through and all of the terms of the instruments, she was led by Ellis to believe that she was receiving rent from the property. She was led to believe by Ellis that she was to take depreciation on the property. She was also led to believe by Ellis that she was to pay for the repairs for the property, to pay for the improvement of the property, to make advances down the line for, well, for the property. Because it was her property. She had to pay the taxes because he didn't pay them. Because the lessee, the lessee, which was Ellis, under one of his many hats, didn't pay it. I find as a matter of law that it was never the mutual intent of the parties, it was never the mutual understanding of the party here that this was intended to be a defeasible deed, a mortgage instrument.

I again repeat there was nothing in any of the transactions up until this time that on December 31, 1975, that indicated to Corey that she could expect anything back in the event of an exercise of the option other than what would have been reasonable and fair under the circumstances as Ellis explained it to her.

She had no reason to expect that she would be

getting a great windfall as occurred in Kawauchi. As has been said many times, a mortgage is a mortgage. It doesn't change. As is said by counsel for Mrs. Corey and a deed is a deed and it doesn't change. I find that this was a deed conveyed to Corey, in fee this property subject to a run of the mill type of option to buy back. That it was executed by her in that manner because she thought -- because she was influenced to do so by Ellis and because she thought that she was doing him every favor that she could.

Instead of getting a favor, however, doing a favor, she found that he was imposing upon her as he did clearly specifically, more and more advances, more advances, more advances, until she had some \$140,000 into the premises. And Court notes that in the beginning the price of 85,500 was not, quote, a steal. Although as I said before, there was this veil, I think it was, appraisal for \$140,000. The upset was 120. And Chaney, who this court recognizes has been in this business a long time, set the upset price at eighty-five five. And that's the price that Corey thought she bought it at at that sale.

And as you take a look at it, it goes down the line. There is no indication that the value of the property had suddenly changed over the next -- over the immediate period following the transaction. It wasn't until here we have it in 1975, December 31, it suddenly appears that there is action in that Silversword area, that there is money far in excess of the original price of \$187,000 that Ellis said that he bought it for, which this Court has questioned that figure as representing the true basis, especially in the light of sales, estimation, fixing \$140,000 and Chaney being willing to sell it for eighty-five five.

So I hold that at the time this instrument was executed, it was a deed and not a mortgage disguised as a deed. It was not the instrument that Ellis intended to be there.

If more were needed in order to grant the judgment in favor of Corey as prayed for, it is found in what occurred there in December, 1975, and in '76 and in '77. All of a sudden we find Ellis apparently realizing that there is a lot of money. Now that they are making a lot of money gotten out of the Silversword property.

So, he entered into this option extension we have referred to shown in WSE 1, 31st day of December, 1975, which he goes down and recites all of the history and background, et cetera. And it is noted that he doesn't say that she is the mortgagee in this instrument. I say that because soon it appears in the instruments that he prepared that she is the mortgagee. But not in this one.

And when we come to the matter of option, the options may be exercised independently. Options shall not be plead pledged] to [or] assign[ed]. Option existed before December 31 and Upland may purchase the above described on or before December 31, 1976, 246,000 cash.

I have indicate[d] before, even that 246 was not true figure indicating any problem. Because from that had to be deducted 33,000 and 5,000 payments or loans as set out by Ellis in the instrument.

But then we note that particular agreement that she did give there Ellis an option of the year at a fixed price to pay the property. And then it provided, however, Ellis turn around and sell it, he is going to give her a cutback if it goes over \$492,000 or goes over for that two.

But then comes number 8. I don't understand this because one gave Ellis Upland Investments, which is the same thing, the right to make all of this purchase anytime within that year.

But then we find this, that in the event the purchase to Lot 2 should not be exercised before March 31, then it was going to be all offered through sale. So that 9 took precedence over the prior paragraphs and it was going to be offered for sale after March 31, 1976.

Now, this instrument to this Court indicates that Ellis on one hand was trying to get the picture more fully into the pattern of Kawauchi. But on the other hand, when you look at it, it would indicate that Ellis recognized that Corey had a fee simple. And he was trying now to fix the price which he could buy it back. Could buy the property, not buy it back. Buy the property. That's why the option extension set forth new terms. But it did not set aside the original impact and import of the deed back there in 1971.

On that same day -- excuse me. Exhibit 2-A, Exhibit WC 1, I think they are the same. Yes, they are.

Then what occurred next was most revealing. I thought I had it right here. That was -- I must have left it on my desk in there. Go see if I left it on my table.

That was the agreement listing of the -- see if it isn't on my table in there. It is out there. Don't waste my time. Go get it off my table.

The listing agreement. All of a sudden here we have an agreement between Ellis and Corey to sell the property. Corey has a license to sell the estate as a broker. Ellis is also a broker. So the agreement is entered into that Corey will be the one with whom the property is listed and they will agree that they will

make sales the same. And the price setting there and the time is setting there. Well, I will have the numbers in a few moments. And clearly as one reads that listing agreement with the intention of both parties at that time to sell, Ellis is always cutting himself in for a large piece of the action.

I will have to take a five minute recess.

(Recess taken.)

MS. RYAN: Your Honor, Mr. Duca offered to allow you to use his copy. I have no objection.

THE COURT: May I have it?

MR. DUCA: Yes, you may. Mine has highlighter on it. That's not on the Court's copy. I think we should have a stipulation that there is no objection to that.

MS. RYAN: This is my objection.

THE COURT: Save your time. I won't use it because it is in the record.

THE COURT: There is a flurry of instruments on there around December 31, 1975. The option extension and the listing agreement is the one I thought I had right at my fingertips. And by that listing agreement, when one reads it through, it is clear that -- I have it now. Here it is. Exhibit WSE 9. That is the one which was not used. This is the one that has all of the changes made after the discussion apparently between Corey and Ellis.

And I note in that Exhibit WSE 9, simply confirmation of what I said many times. Here is Upland Investments, optionee, and owner of the trade name Silversword, and Ellis is the lessee of the property from Corey. And sale from Corey Realty and Florence Ellis, sole stockholder of the Silversword, Inc., et cetera.

And we find over on the last page, page 6 of the Exhibit WSE 9, a statement. And so far as a Notary Public, that Ellis, the person who executed the foregoing under power of attorney dated September 14, 1960 in the bureau and recorded in the Bureau of Conveyances Liber 3917, page 314, all the time that Florence Ellis is doing any business, it is her husband who has all the power of attorney.

Now, here then is a listing agreement. And that's WSE 2. December 31, 1975, another one of those on that date, and wherein it says that Corey as owner of the following described real property, and Ellis as lessee of the real property from Corey, they agree that part of that, the parcel and the Sword, all the stock in the Sword, Inc., and everything else can be sold as to be offered to for sale, 660. The stock in the Sword, 10,000 bucks included in there, 650,000 for lot 2. And Corey and Ellis shall approve the terms. And if it is not sold by September 30, '76, it shall be reduced to 450. Then it shall terminate in the event the subject option should be exercised by Upland. Otherwise the listing agreement shall terminate on December 31, 1976.

So that you see Ellis is taking care again, if he can make a special deal ahead of time before that date, he will. He will exercise the option.

Then that, together with the escrow instructions on page 3, paragraph 8, provide for in paragraph 5, Upland shall execute and file cancellation of its option to purchase. All the way through anyone reading this would give full credit to the fact that this was intended to be a sale, fee simple, to Corey. And Corey, by all of this, had that right into the property. And what did she do?

Well, didn't get it quite so. Price went back and forth. Then she entered into this deal that described more fully in the matter of Ellis by the Court of Appeals, she entered into the deal with Loui, signed the DROA with Loui to sell 575.

Now, to be sure, this was after December 31, 1976. But we find here on the 26th of '77, Exhibit WSE 5, Ellis is doing everything to memorialize all the transactions as he wants it to be understood.

Dear Lil. This is written in the capacity that I signed the listing agreement dated December 31, 1976. Well, he meant '75 but he put '76. Its purpose is to prevent any misunderstanding concerning recent events. As you know, I have a ten-year lease of the Inn. I told you in detail during my visit of the 15th, I was about in the home stretch heading for a 31-77 takeover. Base rent would be in the neighborhood of 2500 a month. You know that I commenced these finances with intent of arranging financing to exercise purchase option on 1-15-77. I also discussed alternative uses of lease rent. You said you would renew contact with Tom Wong for Herb Loui, try to get 750, discussed the possibility of subdividing and so forth. On 1-15-77 you wouldn't indicate how you intended to dispose of the sales proceeds. I agreed you might feel Loui out at 750.

Now, this is after the end of the listing agreement. And he is not at that time insisting that she had no power thereafter to go ahead and list. But clearly appears and Court so finds that this constituted an oral understanding that everything did -- the listing didn't end solidly as of December 31, 1976.

And then he comes in, I discussed the situation with the majority stockholders of Upland on Maui. Well, I

don't know who the majority stockholders are. And I find Ellis was running Upland. And it was agreed to sell at 750 on the format of the listing agreement. In other words, still go ahead. This is essentially a partnership format. But the mortgagor joining with the mortgagee became partners all of a sudden.

This is just part and parcel of the way in which Ellis works. And you told me on the 25th about the real property tax bills on the premises were paid by whom? Here we have it. The receipt, Exhibit No. 6, the tax for the year '81, '82, '83, '84 and '85 have never been paid by the lessee, Ellis. Here, as the owner of the property, she was being charged for the bill and she paid \$8,949. There in 12-31-85 is when the bill shows up.

Then you dropped off the DROA signed by Loui giving until 9 p.m. 1-27-77. This is to let you know I don't concur or incur the use of this and so forth. Whatever [Whether] I concur in the other terms would depend somewhat on how much of the net proceeds would come up to Upland. That's WSE 5. He was willing to let it go through as soon as he found out how much Upland was going to get. And get two weeks extension and Upland be included to the seller in any DROA. Then he throws at her under the law of Hawaii you might not be able to deliver a clear title. This he didn't come out and say you don't have a clear title, nothing about a mortgagee. Hey, look out, you might not be able to.

Then he goes ahead by Exhibit 6 and follows it up on the 27th, next day, what he had done. How you delivered the letter, based upon the computations, here we go back in to try to throw now again usury. Based on computation, I told you the total amount would be

due you maximum legal rate of interest would be about \$209,000. And she had had nothing except bills out of her attempt to help Ellis get back on his feet and put him back on his feet in 1970, '71. And the formula of listing if the property sold, Upland received 575 during the terms of the listing agreement. I have already found that he waived that as that's clearly indicated by his communication here.

Upland would receive 265, you 282 and Sword 10. And I mentioned that 262, 250 figure he would breakfast (phonetics), not by way of lawful suggestion, illustrate what hundred thousand Upland and none of the Sword entirely acceptable. It goes to 575, and you would receive 457 compared to the 282, five under the listing agreement and 219,000 at the maximum legal rate of interest in your cash outlay. You increase the offer. And he turns everything down and highly probable that an offer of 575 could have been obtained during the last two months of the listing agreement. Don't bother me, I am busy from now on. That's what he said.

Then he writes another one right down the line. He says 2-3-77. Here comes Ellis. I am enclosing -- noted in my 1-27 note. Dear Lil. Still 2-3-77. Exhibit No. WSE 7.

We discussed the theory of law that might prevent you from passing title to Loui. Our position is based upon the law. And the option for extension of 12-31-75. When he attempted to change what was a deed into usurious mortgage. And based upon the facts, any law title has to determine whether you can deliver a clear title, you better discuss it. He is throwing out the fear to her.

Then 16th. Dear Lil. Five hours of pleasant mixed

chitchat and business on 1:15 breakfast through lunch. We agreed to the verbal agreement that you would offer to Loui for 750,000. My 1-26 relates to the circumstances of extreme pressure and your unilateral decision considering the statute of frauds with which you are admittedly familiar and law of contracts. I have no proof that this is a sale, there is a sale to go through. Nothing has been signed and he is then giving, in effect, not advising her, but just telling her I suggest it is your best interest to promptly establish an escrow, mail me a copy of the escrow instructions.

All of this constitutes a waiver of all the objections that he had to her entering into, if he had any legitimate right to make any, to entering into that escrow agreement. And he wanted a different title company. And unless and until I prove that bona fide consideration is passed from Loui and mechanics of the transaction that set up, there is no sale to discuss. She went ahead with the sale, all recited in Ellis, Matter of Ellis. All of a sudden then we find here in '79 and following that -- No, not yet. '77. A flurry in '77, a flurry of declarations and the like made by Ellis, filed by Ellis, declaration of first mortgage. And says that here that there was a certain first mortgage in favor of Bessie Hagopian. That's Exhibit No. 4.

As we see as we go down the line it was just another of the straw or shell corporations that Ellis turned out of his machine. And this is between -- this one declaring the first mortgage is between Ellis and Upland Investment. And then here the amendment to declaration of first mortgage because they made a mistake in it, signed by Ellis, and only then there is a warrantee deed. Those prior instruments were there.

In September, 1977, Corey had gone ahead with the

deal with Loui. And here we find a warrantee deed paid by and Pauline and Shaw (phonetics) to Upland Investments. And we see in here that the property we sold Upland Investments, as if they own the property, it is only subject to the following mortgage, that certain mortgage.

Well, that's between Shaw and Robert and Pauline. Well, Pauline is his daughter. Upland Investments by William Ellis and Marie Ellis, vice president, treasurer. And who are they? They are the father and mother of Ellis.

And then we find that Shaw -- that was in September -- we find that Shaw's, the Shaws, Mrs. Shaw's daughter is the daughter. In December, 1978, they make -- as of the 1st day of September, 1977, although that's when it is marked back to, that they then transfer that same subject to the first mortgage in favor of Lillian Corey. They declare that they hold their interest in joint tenants in the trust property as trustees of Silversword Trust and Michigan Trust. And they live -- all of the persons who are beneficiaries. And you see that they are all within the family, close family friends of Ellis.

And that was not notarized until some day in December, 1978, although it starts out this venture made the 1st day of September, 1977.

Then another part of this mortgage theory now is Shaw, trustees of the Silversword Trust in consideration of \$723,300. That's phony as a \$3 bill, consideration of that much money and say that they had gotten it. They sell all of this parcel, Paul Robert and Paul Shaw, sell the parcel as of January 1, 1980, William S. Ellis, Jr. In bankruptcy he is at that time and had been since '72. But they are selling it to him.

And he then on a deed dated September, 1980, apparently -- Yeah, September 1, 1980, he transfers it to Kulalani, Ltd. Runs right on down. Kulalani and finally ends up in the Auna Trust. Each and all, everyone naming big figures as if that money was passing back and forth.

But it is pure fix [fiction] and wind[s] up in non-profit created by Ellis and run by Ellis.

And meanwhile what has happened?

First I would hold that by executing that agreement to sell, or that -- pardon me, that listing agreement and by the exhibits I have just read concerning what he wrote afterwards extending the same, that he is estopped. He is estopped to deny that Corey had any good right to title to sell the entire property including the \$10,000 that was supposed to go for the Sword, that is, to the corporation.

What do we find occurred after that? It is all in the record here. Corey -- he induces Corey not to go through with the deal. She is completely confused and tries to follow this, yet she doesn't follow this. So he said -- his suggestions -- not advice -- and she fights them. She fights them, delivering anything to the Louis, gets involved in all of the lawsuits and hiring of an attorney. The only attorney that she turned to, herself, apparently was Kawasaki.

Wasn't that who it was? The first one?

MR. DUCA: Kanasawa.

THE COURT: Kanasawa was the first one.

And after that we find that the record here shows, Exhibit shows that attorney after attorney was hired by whom? By Ellis. Ellis selected the attorneys. And they in all the instruments and so forth that the Ninth Circuit saw and reportedly indicate in there recite that

she was the mortgagee. She was the mortgagee. She was the mortgagee when in truth as in fact I just found she was led to believe that she was a mortgagee as part and parcel on attempt on the part of Ellis to prevent the sale to go through because he wanted money. He wanted a lot of money out of it.

And then what was he doing? Whenever he didn't pay some several thousand dollars in attorneys' fees, but the wanted to charge that off against the princip[al], which he admitted was due under his theory that she was a mortgagee. The princip[al] of the amount of money that she had paid in by preserving this piece of property.

Knowing that the Ninth Circuit may not follow my analysis -- they are not bound to -- knowing that there is always a chance my own evaluation of the evidence will not be accepted by the Court of Appeals, I would also hold under the power of equitable reformation that if that was intended, questionable [equitable] reformation which is referred to in the dissent in Kawauchi, as indicating what a majority had done in that case under the power of equity, I would reform that instrument of that deed. If it were ever to be deemed a mortgage, I would reform it into what it was intended to be by Mrs. Corey, I reform it into a deed clear and unquestionably not a defeasance deed.

Ellis, by what he has done in this case, has not alone [only] taken over \$140,000 in cash out of Mrs. Corey's accounts. He had enabled her by that listing agreement to believe that she had the right to go ahead and sell it.

Now, I would hold that he is estopped to deny that she didn't have the right to go ahead and sell it after December 31, 1976, and that he was the one that

advised her then to try to get out from the deal. He was the one that advised her to claim that there was -- that she was the mortgagee to hold herself out as the mortgagee in order to avoid the sale on the basis she couldn't deliver what she promised to deliver and so forth. He is the one who was basically at the foundation of the entire judgment which the Louis subsequently got against her in the sum of some \$700,000. She is the one who is forced to go into bankruptcy because of the fact that she thought she bought the property back in 1971, '70, '71, and that she had a right to do what she did when she sold the property. And that he is the one who was at the bottom of all of her great financial troubles. And so equity demands that he not be allowed at this time to say, well, let her take the loss of all of that money, \$700,000, and wind up with what? Wind up with virtually nothing under his theories.

This Court authorizes the sale of the property as prayed for under either of the two theories. Or if I have put three in here, three theories. On any one of the three. Corey is entitled to the relief she prays for.

Counsel will prepare the order, findings of facts and conclusions of law.

MR. DUCA: I shall, Your Honor.

THE COURT: Stand in recess subject to call.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re	BANKRUPTCY NO. 84-00371
LILLIAN HAGOPIAN COREY, <i>Debtor,</i>	
LILLIAN HAGOPIAN COREY, <i>Plaintiff,</i>	ADV. PRO. NO. 85-0185
vs. KULALANI, LTD., <i>et al.</i> , <i>Defendants,</i>	
In the Matter of WILLIAM S. ELLIS, JR., <i>Debtor.</i>	BANKRUPTCY NOS. 72-391(3) AND 72-391(4) (Consolidated)
and HELEN B. RYAN, etc., <i>et al.</i> <i>Plaintiffs,</i>	
vs. LILLIAN H. COREY, <i>et al.</i> , <i>Defendants,</i>	
and HERBERT H.K. LOUI, <i>et ux.</i> , <i>Defendants,</i>	
vs. KULALANI, LTD., etc., <i>Additional Counter- claim Defendant.</i>	BANKRUPTCY NO. 70-249
In the Matter of WILLIAM S. ELLIS, JR., <i>Debtor.</i>	

Filed August 15, 1988
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DECISION AND ORDER

I. PROCEDURAL HISTORY

Beginning on June 15, 1988, this court, for five days, tried the issue remanded to it by the Court of Appeals in *Matter of Ellis*, 674 F.2d 1238 (9th Cir. 1982). Following the mandate of the appeals court, this court has attempted to determine the "true substance"¹ of the March 1, 1971 transaction by which William S. Ellis, ("Ellis") gave a general warranty deed covering Lots 2 and 4 of the property commonly known as the Silversword Inn ("Inn") on Maui, to Bessie Hagopian, sister of Lillian H. Corey, in exchange for \$85,500.00 paid to Ellis by Lillian Corey ("Corey"). As set forth hereafter, this court has determined the intent of the parties to that transaction and, in due course, shall enter its final judgment in Bankruptcy No. 84-00371, as well as Bankruptcy Nos. 72-391(3) and (4).

These findings also decide the first phase of the motion filed February 9, 1988 by Debtor Corey in her Chapter 11 proceedings, Bankruptcy No. 84-00371, by which she seeks authority to sell Lot 2 of the Silversword Inn pursuant to 11 U.S.C. section 363(f). Corey's motion claimed the right to sell Lot 2 and have all claims of ownership transferred to the proceeds of such sale because Corey alleged that her ownership of Lot 2 was disputed by Ellis and his corporate assignees. This court has found that Corey has a bona fide and valid claim of ownership of the Silversword Inn (Lot 2). In a subsequent hearing, this court shall

¹ *Id.*, at 1247.

determine the proper procedures for a sale of Lot 2 by the Corey estate, and shall address such requests for turnover orders as the Corey estate may later file.

These findings also decide the nature of the claims of the Ellis estate in Bankruptcy No. 70-249, and to persons claiming by, through, or under the Ellis estate, to ownership interests in the Silversword Inn. For the sole purpose of deciding these ownership issues, this court has consolidated the Corey estate bankruptcy proceedings (Bankruptcy No. 84-00371) with the Ellis estate bankruptcy proceedings (Bankruptcy Nos. 70-249 and 72-391(3) and (4)), since there are identical issues and parties as to the disputes relating to the title to Lot 2 and the Inn, and the consolidation would further the goals of speedy and efficient bankruptcy administration.

In *Matter of Ellis, supra*, the court of appeals reversed the holding of Judge King that the bankruptcy court, in Bankruptcy 70-249, had confirmed a sale from Ellis to Corey rather than a mortgage by Ellis to Corey, because it appeared to the court of appeals that King's conclusion had been based only on the form of the deed itself and on the language in the Bankruptcy 70-249 Order. The appellate court remanded with instructions that a full hearing should be held to determine whether the parties intended a sale, or that the bankruptcy judge in Bankruptcy 70-249 understood the transaction to be a sale and based his order and confirmation on that understanding. It is therefore mandate that this court makes the following Findings of Facts and Conclusions of Law.

Immediately following the five-day trial, this court made an oral decision, from the bench setting forth therein certain findings of fact and conclusions of law.

All findings of fact and conclusions of law stated therein, and not in conflict with those contained in this Decision and Order, are incorporated by reference and included herein.

II. FINDINGS OF FACT

Corey is now an eighty-three-year-old woman, who was originally trained and worked as an elementary school teacher. For a number of years prior to 1970, she had been a real estate investor and landlord of cheap residential properties. She had also invested in stocks. She was not a money lender. Prior to 1968, she was married to an attorney named Ralph Corey. In 1968, Corey and her husband became involved in protracted divorce proceedings involving disputed claims to property severally and jointly owned by Lillian and Ralph Corey, which were not resolved until 1973.

Long before the divorce proceedings began, Corey became acquainted with Ellis, who sometimes worked as a paralegalist for her husband. Corey also knew Ellis' wife, Florence. Ellis had attended Boston University, University of Washington, Northwestern University, and, in 1944, was given a BA degree in Business Administration from Washington State University. From 1946 to 1947, he was a navy officer with the Joint Intelligence Center; from 1947 to 1954 he was editor and publisher of small magazines of the Honolulu Star Bulletin and the University of Hawaii Press; and from 1954 to 1960 he operated a printing company to produce specialized reports for government agencies. Meanwhile (1953 to 1957), he was executive secretary for the Hawaii Farm Bureau Federation, and in 1956-57 he was employed by the Attorney General of the State of Hawaii to research and draft amended statutes to

revitalize the Farm Loan Board. As he himself states, from 1946 to the present he has organized and managed corporations and partnerships for family and associates. He is a self-proclaimed authority on Hawaii water and land law, and is a real estate promoter and subdivider of Maui property. From 1959 to 1977, he was involved in a multitude of subdivision developments on Maui. He is also a licensed real estate broker.

Though Ellis was not licensed to practice law,² he acquired over the years a detailed knowledge of Hawaii real property law. Such was his belief in his own knowledge of the law that he admits being involved in roughly 40 lawsuits in both state and federal courts involving real property, in all but one of which he appeared pro se, as his own lawyer. He, pro se, carried on the appeal of 10 of those cases to the 9th Circuit, and 14 of those cases to the Supreme Court of Hawaii. In the present action, he appeared pro se, cross-examined witnesses, and himself testified. Ellis also admits to extensive experience in drafting statutes, contracts, corporations, and conveyance documents.

In contrast, though Corey is intelligent, she is clearly unsophisticated in legal matters and does not have an understanding of either legal procedure or language. Despite her broker's license, most of her transactions in real estate were for her own account, and few involved any significant complexity. From her demeanor, method of expression, and responses to the

² The court takes judicial notice that under Hawaii Supreme Court Case #5044, *In Re the Matter of Unauthorized Practice of Law*, William S. Ellis, Jr. docketed before the Supreme Court on October 8, 1970, that court, on August 19, 1971, filed an Order enjoining Ellis from engaging in the unauthorized practice of law, and on September 23, 1971, filed a final judgment permanently enjoining Ellis from the unauthorized practice of law.

questions of court and counsel at trial, and from this court's observation of her in her previous appearances in her bankruptcy case, this court finds that Corey is a person who is sincere, practical, straightforward, and trusting. She is also impulsive, gullible, highly influenced by those she considers her friends, and inclined to yield to pressure from others whom she respects.

On the other hand, Ellis demonstrated through his demeanor, his hesitation in answering questions, his frequent inconsistencies or implausible responses, and his general pattern of self-serving and complicated legal maneuvering, as set forth in detail hereafter, that he was, and is far more clever and far less trustworthy than Corey, and that he had both the opportunity and the greedy desire to use his cleverness to gull and defraud Corey in the course of his Bankruptcy 70-249 and in his dealings with her regarding the Inn property.

While Corey's divorce was pending, Ellis was a source of advice and comfort in the property settlement involved therein, and he convinced her that he was her real friend. The divorce was a contested one, and Ellis offered Corey suggestions about ways to protect her rights in the division of property, although Ellis denies that these suggestions or any subsequent suggestions that he gave her on legal matters were "advice".³ Ellis also offered assistance of a more common variety: the simple consolation of a supportive listener. As a result of this support and several other favors he had done for

³ Ellis testified that he never gives "advice" - thus carrying on his protestations that he is not an attorney. As many of the exhibits (his letters and communications to Corey and others) show, he has, in fact, advised them as to their legal rights and liabilities, as well as to courses of action which he recommended. Cf. note 2, *supra*.

her over the years, Corey came to feel a friendship and debt of gratitude to Ellis and to rely on his advice and representations. She also knew that he was supposed to be a genius in his knowledge of real property law.

As the Bankruptcy 70-249 file (Court's Exhibit #1) discloses, in the 1960's, Diversified Investments, Inc., successor to Hale Moi Lodge, as well as Ellis personally, out of his operation of his publishing company and the Hale Moi Lodge, Inc., dba Silversword Inn, were so indebted to a number of suppliers of building products and services, state and federal tax liens were filed by the creditors against, mainly, Diversified Investments, Inc. One of the creditors, MDG Supply, had taken a mortgage on the property in 1960 and foreclosure action was taken. Creditors' claims totaled over \$100,000.

Florence Ellis, in July 1964, had secured an assignment of the lease to the Inn from Maui Corporation, and in October 1964 she transferred it to her husband, Ellis. On January 5, 1968, Ellis assigned that lease to Silversword Corporation, one of his shell, family corporations, and extended the underlying lease to run until June 30, 1983.

MDG Supply Company, Maui Concrete, Credit Associates of Hawaii, and others had sued Diversified and Ellis, and on September 1, 1968, secured a judgment in the Second Circuit court ordering the sale of Lots 2 and 4 by commissioners appointed by the court. It was immediately thereafter that Ellis had Diversified transfer the property to him, and he then proceeded to dissolve the corporation setting himself up as a "trustee in dissolution." Ellis' appeal to the supreme court was unsuccessful, and the auction sale was ordered to be held on August 21, 1970.

On August 20, 1970, the day before the scheduled sale, at 3:20 p.m., Ellis filed Bankruptcy 70-249 for a real property arrangement under Chapter XII, and on the same day, at 3:39 p.m., filed and recorded a Notice of Lis Pendens claiming that all acts and proceedings to enforce liens against the Inn were automatically stayed by his bankruptcy filing.

In his plan of arrangement as then filed, his only assets were Lots 2 and 4, which, as indicated above, were subject to mortgages, judgments, liens, and other encumbrances. By Articles VIII, IX, and XII of his plan he was to convey the property "within three months after confirmation of the arrangement . . . to a person, persons, or entity" and the creditors "shall be paid in cash in full upon conveyance to the debtor's successor." The total debt to be affected by the arrangement was \$128,472.70, with an additional of some \$50,000 due certain secured creditors, and some \$30,000 unsecured. Frank L. James is listed as a creditor "on a note which ought to be paid by the maker" (Ellis) in the sum of \$10,125. Among his "assets" he listed as "Choses in Action" five lawsuits in which he was plaintiff, as unliquidated claims having a total value of a million dollars and -- \$50 in the bank!

On that same August 20, 1970, Ellis called Corey to invite her to attend the foreclosure auction of the Silversword Inn that was scheduled for the following day. Prior to this call on the 20th, there was no evidence of any interest on Corey's part in the business affairs of Ellis or in the prospect of advancing funds for him for any purpose.

On the day of the sale, Ellis filed a "Notice of Exclusive Jurisdiction and Automatic Stay of Lien Enforcement" against Aaron M. Chaney and George

Ezaki, and MDG Supply, Inc. -- before 11:00A.M., Friday, August 21, 1970, together with a copy of the Notice of Lis Pendens.

It was at his request, therefore, that Corey accompanied Ellis to the auction of the 21st, which was being conducted by Commissioner Aaron Chaney. Despite the fact that Ellis served him with the Notice of Exclusive Jurisdiction and Automatic Stay, *supra*, in an attempt to stop the auction, nevertheless, the auction had been advertised to take place and Chaney, not having any stay order before him, proceeded with the auction.

Ellis testified regarding the appraisal that had been made of Lot 2 prior to the Commissioner's sale. A review of that appraisal⁴ shows that it was made at the request of Commissioner Chaney and sent to him on June 2, 1970. Clare DeVault, MAI, appraised the land at \$66,825, and the improvements -- 6 chalet-type cottages, a bar and restaurant building, and one residential building -- at \$78,175. It was DeVault's opinion "that the price that could be obtained for the property (at a Commissioner's sale) is within the range of \$125,000 to \$145,000." DeVault stated, "The entire area is primarily agriculture and used for cattle grazing . . . total number of people living in the area is relatively small and, for the most part, do not utilize the bar and restaurant facilities of [the Inn]."

Commissioner Chaney, a very experienced real estate broker and property manager, allowed the bidding

⁴ The appraisal was filed 12/28/70 in Bankruptcy #70-249. That file, however, had been transferred out of the bankruptcy files of this court to the government depository on the mainland, many years ago, and was not available at the time of the trial. The entire file has since been returned to this court, and the file and all relevant material contained therein is admitted into evidence by this court, as Court's Exhibit #1.

to open at \$80,000. There were but two bidders at the auction -- Frank L. James, a creditor of Ellis, and Corey. After several rounds of bidding, the Commissioner accepted Corey's bid of \$85,500.00 as the highest and concluded the auction.

Corey's decision to bid was impulsive, reflecting the same characteristic which she had demonstrated to this court both at the trial and at various prior appearances in connection with her bankruptcy proceeding. There had been no prior understanding between her and Ellis for her to do anything except watch the auction, and she did not come to the auction with the necessary cashier's check required from bidders under standard foreclosure procedures. However, when invited to bid by Chaney, who knew her, in order to help her friend Ellis and egged on by him, Corey decided on the spur of the moment to bid on the property. Corey was aware that Ellis and his wife, Florence, were living on the property, operating the Inn, and had some emotional attachment to it. She hoped that her decision to purchase the Inn would spare them the need to relocate; she wanted to help her friend, Ellis.

What Corey did not know was that Ellis was secretly intending to use her purchase as another ploy of creating more confusion in his frantic efforts to keep the property from being taken away from him and keep control of it.

The court finds that the bid price was close enough to the fair market value of the property at the time to be accepted as such by Commissioner Chaney. The sale was advertised, and there is no evidence suggesting any irregularity in the Commissioner's pre-sale procedures. The Commissioner evidently doubted the utility of the appraiser's estimated sales price, and

he accepted bids below the appraiser's estimate. There is no credible or reliable evidence of a higher market value at the time of the auction.

It is here to be noted that although Ellis reported to the court that he had bought the Inn lots from Diversified Industries for \$187,000, the true consideration for the transfer of the title to Lots 2 and 4 to Ellis from the corporation is set forth in docket entry 62 in Bankruptcy 70-249, filed by Ellis on January 21, 1971: "Application for Order Confirming Unanimously Accepted Arrangement." Ellis, acting pro se, sets forth therein in paragraph 18 that Ellis was manager of Diversified Corporation from March 1962 until its dissolution in October 1968, without being paid for his services after June 1963; that Ellis purported to buy the property for \$187,000 from Diversified in September 1968 on the understanding with Diversified that "any difference between said purchase price and the lesser sum required to settle all indebtedness" against Diversified "would be satisfaction in full of services rendered [by Ellis] from July 1963 to October 1968."

Ellis, by his arrangement in the bankruptcy court, settled \$184,058.51 in indebtedness, leaving a difference of \$2,941.49. Ellis continues, in paragraph 18, "said difference of \$2,941.49 is also effectively extinguished by the amended arrangement for an aggregate of \$8,114.41 when added to the \$5,169.92 claim for services now assigned to creditor Smith."

19. That, therefore, the effect of the Amended Arrangement is a down payment by your applicant of \$8,114.41 on a purchase price of \$187,000.00, the assumption of \$85,127.01 in claims against the grantor, and the payment of \$85,500.00 on account. \$8,500.00 [sic] was the only actual cash involved in

the entire arrangement, and it was all put up by Corey. Ellis continues in paragraph 20:

20. That, upon conveyance of the subject property by your applicant to Bessie Hagopian, the repurchase option will be valued at \$101,500 in relation to your applicants purchase price of \$187,000.00, or at \$54,500.00 in relation to Clair J. DeVault's appraised value of \$140,000.00; therefore, that said option is ample security for the \$29,925.00 in claims assigned to and administered by creditor SMITH under the Amended Arrangement.

As appears from the above, Ellis *never*, at any time, put any of his own money into the purchase of the Inn properties!⁵

August 21, 1970, was Hawaii's "Admissions Day" holiday, so on the first business day after the auction, Corey replaced her personal check for \$8,550.00, which she had given the Commissioner, with a cashier's check.

On October 27, Judge Tavares called the attention of Ellis, Mr. Luna for MDG, Mr. Hondo for the state tax office, and Mrs. Ryan for certain other creditors to *In re Collins*, 75 F.2d 62 (8th Cir. 1934), which cast a doubt upon the validity of Ellis' action in transferring

⁵ This court notes that the court of appeals, in *The Matter of Ellis*⁷ on p. 1249, finds that paragraph 19 suggests that Ellis was to remain the owner of the property since "Ellis was making a down payment on the purchase price of the property." As indicated immediately above, *this conclusion of the appellate court is incorrect*. Ellis never made any down payment whatsoever on the purchase price of the property. Paragraph 18 above shows that the \$8,114.41 was composed of the difference between the artificially fixed price of \$187,000, minus the actual creditor's claim of \$184,058.51 "is also effectively extinguished by the Amended Arrangement for an aggregate of \$8,114.41 when added to the \$5,169.92 claim for services now assigned to creditor Smith."

the Inn from Diversified Investments, Inc., to himself, and then going into bankruptcy in order to delay his creditors. Tavares stated that *In re Collins, supra*, indicated that the court might allow the August 21 foreclosure action to proceed. Tavares did not so act, however, because of the mixed up state of the title, including huge records of litigation concerning Lots 2 and 4, and MDG's own action in the state court to set aside Ellis' deed as a fraud on the creditors, Ellis and Mrs. Ryan arguing that all of the above might have influenced the bidding on the foreclosure action.

By that date, Ellis had never offered any hard cash or given any indication of real ability to carry out any arrangement. It was then that Ellis conceived the idea to use Corey as a means of getting hard cash into his property arrangement.

The bankruptcy record shows that on November 1, 1970, B. Martin Luna, attorney for the major creditors, wrote to Ellis stating, "You must submit a plan . . . as soon as possible in order that acceptance of the plan may be done by December 15, 1970. It is our understanding that upon acceptance, *a deed free and clear of all encumbrances would be given to Mrs. Corey, or whoever is depositing the \$85,500 . . .*" (emphasis added.)

In order to raise hard cash, as shown by Exhibit T-15, on November 17, 1970, Ellis is writing to Corey:

The Orders of Judge Tavares and Judge Hawkins mailed to you yesterday enable Mr. Chaney to return to you by authority of the respective courts the \$8,550 deposit made on August 21, 1970.

The Order of Judge Tavares enclosed sets up the authority and safeguards for your deposit of the

\$8,550 and other sums in the registry of the U.S. District court.

Interest payments from lessee Silversword Corporation, as provided in the enclosed Order, will compensate your principal for the money on deposit with the U.S. District Court *until clear title can be conveyed. . . .* [Emphasis added.]

Copies of that letter were sent to Judge Tavares, as well as to the attorneys for the creditors. This court notes that nothing is said therein about any repurchase agreement. This court can only conclude that Judge Tavares, and the other attorneys, believed Ellis was going to convey "clear title" to Corey in return for the \$85,500.00.

This court concludes that the above letter also led Corey to believe (and this court finds she did so believe it for over six years) that she had bought the property at a bankruptcy auction sale.

This state of mind of Corey back in 1970 is clearly reflected in the letter of September 14, 1977 (Exhibit T-1) of Wood of the Carlsmith firm, attorney for the Loui's, to Corey: "It is my understanding from our phone conversations that you purchased the property from Bill [Ellis] at a bankruptcy auction but took title in your sister's name and then gave Mr. Ellis an option to repurchase under certain conditions."

Wood's letter to Corey caused Ellis, on October 22, 1977 (Exhibit WSE 16) to write Corey his "account of the purchase of the Silversword Inn. In it, he gave her references to documents to show her that she did not buy it at a bankruptcy auction as she had believed, and had so told Wood. Ellis sent a copy of this letter to both the Loui's and their lawyer.

From all of the records and exhibits before this

court, this court can but conclude that Ellis deliberately and fraudulently led Corey to believe that the auction was a bankruptcy auction sake [sic], and that she had bought Lots 2 and 4 at that auction; that the bankruptcy court merely confirmed her purchase.

Nevertheless, within a week, Ellis had conned Corey into signing the "Sale and Purchase Agreement," filed in the bankruptcy court on November 25, 1970. As indicated therein, he had, for Corey, filed her \$8,500 deposit in the bankruptcy court *as part of Ellis' Real Property Arrangement*. Paragraph 1 of that Agreement stated, unequivocally, that Lots 2 and 4 "shall be conveyed by the debtor to the purchaser by warranty deed, free and clear of liens, in consideration of the cash payment of \$85,500 into the registry of" the bankruptcy court. Corey's was the only hard money Ellis could find.

Paragraph 2 states that the "purchase price of Lot 2 shall be \$85,000.00, and the purchase price of Lot 4 shall be \$500.00. (Emphasis added.)

Paragraph 3 states that "said purchase shall be subject to the leases of the respective lots . . . [under the lease entered into by Ellis with the Silversword Corporation, one of his many wholly controlled family-based corporations] on November 21, 1970. (Emphasis added.)

Paragraph 4 states "that said purchase shall be subject to repurchase option by the debtor to be exercised not sooner than six months after conveyance, and not later than two years after conveyance." (Emphasis added.)

The statement in paragraph 6 of the Agreement is confirmed by Ellis' response of November 13, 1970, to Luna's letter. Therein he states that he cannot

guarantee

2. That the \$85,500.00 will be deposited in the bankruptcy court immediately inasmuch as it is my understanding that the deposit of said sum will require liquidation of paper at a discount and stocks at a loss . . . a good faith deposit of \$8,550.00 will be made as soon as that sum is released to Mrs. Corey by Commissioner Chaney.

Thereafter, on November 24, 1970, Ellis, as part of his maneuvered arrangement got the \$8,500 check from Corey and deposited that sum into the registry of the bankruptcy court. In the amended Real Property Arrangement filed by Ellis on December 18, 1970, in Article XII, Means for Execution of the Arrangement, Ellis states that

[T]he *purchaser*, Bessie Hagopian, had deposited the \$40,000.00 pursuant to the terms of the Sale and Purchase Agreement . . . filed on November 25, 1970, an Agreement Release and for Payment of Interim Interest filed November 24, 1970. Within 30 days of confirmation of this arrangement by the court, said *purchaser* will deposit the additional sum of \$45,000.00 . . . for a total of \$85,500.00 *purchase* price. [Underscoring added.]

It continues,

The subject property shall be *conveyed* by the debtor [Ellis] to the *purchaser* free and clear of claims but subject to a lease and a repurchase option to the debtor . . . Title search will be brought up to date by Title Guaranty of Hawaii, Inc., and [money] . . . shall be disbursed . . . upon issuance to the *purchaser* of a Certificate of Title, subject to lease and repurchase option. [Under-

scoring added.]

Corey had no intention at that time, or at any time, to make a mortgage loan to Ellis. No loan was ever discussed between them, Corey was not a believer in lending money, and (with the exception of loans to her husband prior to their marital difficulties) she had never previously nor subsequently made a mortgage loan to anyone. Corey was also aware at the time of Ellis' financial difficulties, and the court believes her testimony that she would never lend money to a bankrupt or person in financial distress. Corey neither requested nor obtained from Ellis any appraisal of the Inn or other financial information that usually accompanies a loan transaction to permit a lender to assess her borrower's creditworthiness and ability to repay. Corey intended only to purchase the Inn for \$85,500.00, and when Ellis subsequently requested the same, to give her friend Ellis an opportunity to repurchase it from her when he could get his finances in order, if it didn't take too long.

While Corey's intention in these transactions was a simple one, the intentions of Ellis were somewhat more complex and vastly more devious. In the course of his legal studies, as Ellis testified, he had become aware of the decision of the Hawaii Supreme Court in *Kawauchi v. Tabata*, 49 Haw. 160, 413 P.2d 221 (1966). Although Ellis actually misunderstood the legal basis and thrust of that decision, as discussed hereafter, Ellis viewed *Kawauchi* as a way by which he could transfer the Inn beyond the reach of his creditors and yet still retain control over it, with rights to any subsequent appreciation. Although he claimed at trial that, in connection with some prior transaction in which he was not a participant, he had discussed

Kawauchi v. Tabata with Corey, the court rejects Ellis' testimony on this point, and accepts Corey's testimony that she had never heard of the doctrine of *Kawauchi* until Ellis told her how it applied to her deed, early in 1977, after she had contracted to sell the Inn to the Loui's.

Ellis' intention in 1970-71 was to prepare documents to transfer ownership of the Inn to Corey that would fall within the pattern of the "defeasible deed" discussed in *Kawauchi*. His goal in doing this was to obtain the \$85,500.00 which his friend Corey was willing to put up, without giving up his ownership of the Inn. This intention was carefully concealed from Corey throughout the period 1971-1976, and was obscured by Ellis even in his dealings with his creditors and with the court overseeing this Chapter XII bankruptcy.

Any person who was not as intimately familiar with *Kawauchi v. Tabata* as was Ellis would have assumed from the pleadings he was submitting to Judge Tavares that he was selling the Inn to Corey or Hagopian to raise funds for his creditors, and was receiving back only the purchase price of \$85,500.00 and an option to repurchase the property over the two years following the sale. From the totality of the circumstances surrounding the transaction, this was the plain meaning of the deed and option which were prepared to consummate the transaction with Corey, subject only to the trick Ellis intended to conceal in them: his intention to invoke the doctrine of *Kawauchi v. Tabata* whenever it suited him.

With this secret deception in mind, Ellis drafted two instruments, each dated March 1, 1971. One (Exhibit 1), entitled "Warranty Deed," was a straightforward boilerplate warranty deed conveying Lots 2 and 4

to Hagopian (Corey) free and clear of all encumbrances (except lease agreement and taxes) and stating that Ellis "will . . . warrant and defend" the property unto Corey "against the unlawful claims of all persons."

The other instrument (Exhibit 2), "Option and Consent to Pledge and Assignment Thereof," an agreement between Hagopian (Corey) and Ellis stating that Corey has purchased from Ellis "by a warranty deed of even date herewith," Lots 2 and 4, and stating, "the parties hereto desire to implement [an unrecorded sale and purchase agreement dated October 25, 1970] and to execute fully [Ellis'] amended real property arrangement [with the bankruptcy court]. Therefore, [Corey], in consideration . . . of the foregoing conveyance to her" gives to Ellis

an exclusive option for a period of two years from the date hereof, to purchase from [Corey] all of the interest of [Corey] in said Lot 2 . . . for [\$85,000] plus [5%] . . . per annum from the date hereof and all of the interest of [Corey] in said Lot 4 for the sum of [\$1,000], plus [5%] . . . per annum thereof from the date hereof . . . and Corey . . . hereby consents to the pledge of the foregoing option by [Ellis] to Quentin I. Smith . . . to receive for certain creditors and stockholders of the dissolved Diversified Investments Inc., [Ellis], grantor, and [Corey] hereby consents to the assignment of the foregoing option.

As Exhibit #2, discloses, although the two instruments were purportedly executed on March 1, Corey executed the Option, etc., on March 2, but Ellis did not execute the Warranty Deed until March 4 -- i.e., until *after* he had secured from Corey the desired Option. Ellis was releasing nothing until after he had what he

wanted in his hand.

Ellis made the Warranty Deed subject to a lease of the Inn to the Silversword Corporation, another one of Ellis' shell corporations. As set forth in Exhibit T-19, Ellis entered into an agreement with Silversword to lease the Inn to it and for payment by Silversword of interest to Corey on November 21-23, 1970 -- i.e., four months before Ellis had actually conveyed the property to Corey. He had Corey agree that "the purchase of Lot 2 shall be subject to the existing lease to" Silversword Corporation, with a monthly *rental* to Corey of \$708.33, plus 4% tax, i.e., \$736.67, and with the obligation of the Silversword Corporation to pay "all taxes, utilities, insurance, and maintenance". The Silversword Corporation was also thereby obligated to pay Corey interest on the \$8,550.00 she had put up on August 24, 1970 after the auction. Ellis also took care of himself by subleasing the residence on the premises from the Silversword Corporation for \$1.00 a year, and by providing that Ellis should be entitled to a lease of Lot 4 at \$25.00 a year plus 4% tax.

On November 21, 1970, Ellis entered into a "Supplemental Lease Agreement" (also set out in Exhibit T-19) with Silversword Corporation, whereby Silversword agreed to pay Ellis an increase of 23% of cottage rentals in excess of \$1,500; and increase to 12% of bar, etc., sales in excess of \$2,500; and an increase to 8% of the restaurant sales in excess of \$6,000 from January 1, 1971, with a further jump to 25% of cottage rentals in excess of \$2,000; 15% of bar sales in excess of \$3,000; and 10% of the restaurant sales in excess of \$10,000 from January 1, 1972. The minimum percentage rental was set at \$736.67 a month beginning July 1, 1971, and effective July 1, 1972, the minimum rent became

\$1,000 a month. Ellis also had Silversword Corporation obligated to pay the \$736.67 a month "in any event."

This court finds that Ellis did not disclose the fact that he was getting personal income and benefits from Silversword Inn as part of its lease of the premises. Corey was led to believe that Silversword Inn was paying but a flat rent to her.

The only evidence that the above Supplemental Lease Agreement was ever reported to or given to Corey is contained in the certification on the face of the instruments, as filed *In the Matter of William S. Ellis, Jr., Debtor*, in his 1970 bankruptcy. The Ellis certification thereon is : "I hereby certify that a copy of the within was served upon counsel of record by mailing the same on November 24, 1970." Corey had no counsel of record. Corey's Agreement to Lease was signed in Honolulu on November 23, 1970. The court finds that if Corey was ever sent or received the same -- which is highly doubtful -- she certainly never understood it if she got it. This is shown by Corey's testimony and exhibits that she paid real property taxes -- after she purchased the property -- and, as indicated by Exhibit 14, on December 31, 1975, Ellis sent to Corey receipts "for funds remitted to Upland [Silversword Corporation's paper successor] for repairs and maintenance to the premises of Silversword Inn and for payment of real property taxes." Exhibit 14 also contains this significant statement by Ellis: "You will note that the 12/31/74 receipt, item 2, is for an *advance* against repairs and maintenance. Records of Upland indicate that this advance was applied to repairs and maintenance during the year 1975." (Emphasis in original.)

As shown by Exhibit 5, dated March 11, 1972, Ellis

purports to give Corey a report on her "Silversword Inn Investment, 1971." It shows that she received \$1,033.06 in interest from her "funds deposited in the federal court registry on account of the purchase price of the Silversword Inn premises." He therein reports to her that "when title to the Inn premises was transferred to you, income was rent, plus 4% tax thereon." He therein recites, "Considering my cost and depreciation to February 28, 1971, for the buildings . . . your acquisition cost is tabulated below. Also included in the tabulation are the suggested depreciable life for each building and the 1971 depreciation (5/6 of a year)" He then sets forth the life expectancy, in years, for the residence, main buildings, and chalets, with the 1971 depreciation thereon. It is to be noted that Ellis himself described the payments to Corey following the date of the deed as "rent," while referring to the payments measured from the date of Corey's deposits to the date of the deed as "interest." The distinction which he drew clearly indicates that Ellis wished Corey to believe that she was owner of the fee. Clearly and unequivocally, he was confirming to Corey what she had understood she bought: a warranty deed to the premises free and clear of everything, except the lease and the "option of even date given by the Grantee [Hagopian/Corey] to the Grantor [Ellis] to repurchase the said Lots 2 and 4." This reference to the Option was set out as part of the legal description of the property.

At no time was Corey ever aware that her money and the assignment of the option to repurchase to Smith were being used by Ellis as part of the mechanism by which he would be able to get out of his 1970 bankruptcy proceedings. She was unaware that Ellis was using

her, her sympathies, and her money solely for his own best interests. She was completely unaware that there was any possible legal construction of the Warranty Deed as meaning anything other than what it said on its face, or that the option to repurchase was anything other than a completely separate instrument executed by her with the intention of helping Ellis, whom she thought as one of her best friends.

The possible legal significance of the option to repurchase was never recognized by nor disclosed to Corey at that time. She remained completely unaware of the scheming machinations of Ellis.

As indicated by Exhibit T-16 and by the report of Debtor in Possession for the month of February 1971, filed March 11, 1971 by Ellis in his Bankruptcy 70-249, Ellis recites that Corey made payments to him as follows:

8/24/70	8,550.00
12/ 1/70	14,000.00
12/ 9/70	12,450.00
12/15/70	5,000.00
1/27/71	5,000.00
2/ 2/71	500.00
2/12/71	40,000.00

It is to be noted from the above and other instruments filed in Bankruptcy 70-249 that Ellis was getting payments from Corey and thereafter depositing them with the bankruptcy court as part of his bankruptcy arrangements with creditors. Corey only knew that she was paying Ellis on the \$85,500 she had bought the property at the auction.

Consistent with Corey's belief that she became the owner of the Inn on March 1, 1971, no one paid rent to Corey prior to March 1st, although, as above set out,

Corey had paid Ellis in full on February 21. Ellis instead arranged for the Silversword Corporation to pay Corey interest on the funds which he deposited into court for her from the date of the deposit until the date of the deed.

Ellis pledged the option which he received from Corey as collateral to Quentin Smith, a creditor whose claim was not fully discharged in the Chapter XII proceedings. Smith was owed approximately \$33,000.00, and the documents which Ellis gave to Smith as collateral for this debt was not denominated by Ellis as a mortgage, but simply a pledge of the option. The document was drafted by Ellis. It is to be noted that it was not until *after* 1977, when Ellis sought to pledge the interest of himself or his successor in the Inn as collateral, he would do so by documents which he would then denominate as mortgages, although the source and nature of his title claims never changed after 1971! Ellis' own testimony shows him from 1969 fully knowledgeable of how to draft a mortgage, and so denominated such instruments when he deemed them necessary.

Nevertheless, in 1971 all of the words used in all of the instruments -- warranty deeds, option, leases, bankruptcy reports -- in all, he denominated Hagopian/ Corey as "purchaser". The Certificate of Title by the Title Guaranty of Hawaii, Inc., dated March 24, 1971, showing the execution of the real property arrangements and filed by Ellis April 2, 1971 in Bankruptcy 70-249, and sent to Corey on April 3, 1971 (Exhibit T-17), concludes as follows: "And we further certify that the legal title to said parcels of land [Lots 2 and 4] is vested in the said Bessie Hagopian . . . subject, however, as aforesaid." Nowhere in 1970 and 1971 was there even the slightest inference that Corey had but a mortgagee's interest in the property.

The option which Corey granted Ellis simultaneously with the March 1971 deed was generous to Ellis, reflecting the compassion, gratitude, and faith that Corey felt for one whom she considered her true friend, rather than the attributes of an arm's length business transaction or the overreaching of an unscrupulous lender. In part, these generous terms also resulted from the fact that the terms of the option and the drafting of the option agreement were all the work of Ellis, who consistently gave all benefits to himself and his interest, and to the financial detriment of Corey throughout all of the events during the seventeen years of the Corey/Ellis transactions.

Under the option, Corey was obligated to sell the Inn back to Ellis for a price equal to 105% of her \$85,500.00 investment if the option was exercised within one year, and 110% of her investment if it was exercised within the second year. As in any true option, Ellis had no obligation to pay the exercise price. If the property declined in value or became damaged or destroyed, whether through the neglect of Ellis and Silversword Corporation or otherwise, Ellis was free to elect against its exercise, and to leave the entire risk of loss as to the \$85,500.00 upon Corey.

Ellis personally was not obligated to pay rent, real property taxes, or other carrying costs under the option. The obligation to pay rent to Corey was only the obligation of the Silversword Corporation. There was no option premium paid, nor were there any provisions that would make a lease default by the Silversword Corporation a default under the option. If the option involved unfairness to anyone, it was unfair to Corey.

Unlike the situation in *Kawauchi v. Tabata*, Corey would receive no windfall, whether or not a default

occurred which would terminate the option (note that the option agreement failed to specify any possible events of default). She would merely be entitled to terminate the option and then become the owner of an unencumbered title to a premises of uncertain worth. Viewed from the perspective of the facts available in 1971, there is no evidence in the Ellis option of any subterfuge by which, if the option were not exercised, Corey would receive an excessive or illegal profit from the land, or if it were exercised, Corey would receive an excessive or illegal profit from the exercise price, as was the situation in *Kawauchi*.

On September 21, 1971, Ellis had his daughter's fiance, George Blechta, Jr., as an officer of Upland Investments, write Corey to request her agreement to the exercise by Upland Investments of the option originally granted by Corey. Consistent with Ellis' pattern and character, the proposed exercise would not be a complete cash-out in the manner contemplated by the option, but, instead, offered a payment to Corey of but \$2,479.17 in cash, and a promissory note of \$85,000.00 "to be secured by a first mortgage note . . . payable on or before October 1st, 1973." Ellis Exhibit 4. As reflected in Ellis Exhibit 14, sometime prior to November 12, 1971, Corey rejected the proposal to convert her interest in the property to a mortgage interest. In a letter of that date, Ellis commented to the father of his daughter's fiance about the consequences to Upland of Corey's rejection of the proposal for exercise of the option:

'Main problem is lost depreciation. Until Upland needs it for tax shelter, it's no serious problem.'

Ellis Exhibit 14. Thus, both Corey and Ellis acted as if her rights were those of an owner, not a mortgagee,

and Corey indicated her unwillingness to convert her rights to those of a mortgagee.

When the option to purchase expired in February of 1973, the assignee of Ellis, Upland Investments, was unable to exercise it. By that time, the rents owed to Corey for the use of the Inn were also unpaid and long overdue. Although Ellis testified that Corey told him that she did not want him to pay her any more rent, this court does not believe that testimony.

On May 31, 1973, Ellis prevailed upon her to accept a redraft of the option so that, instead of monthly rental payments, Corey would receive the benefit of an option exercise price that would increase by 20% per year from January 1, 1973, until the exercise date. Of course, this benefit to Corey was illusory if the option were never exercised, but Corey did not understand that. She wanted only for Ellis to purchase the Inn from her or find another purchaser, so that she could terminate her ownership of this property, which brought in no income and for which Ellis was constantly to ask her for money to pay maintenance, repairs, and taxes on what she believed to be her property.

Corey also did not understand the possible illegality of the 20% per year increase in the option price set out in Ellis' 1973 modification of the option terms. With the new provisions calling for a 20% annual increase in the exercise price, Ellis was making the option resemble even more closely the usurious loan transaction described in *Kawauchi v. Tabata*. Once again, relying entirely on the representations of Ellis, her friend, and in the interest of helping him, Corey innocently signed the agreement. The humanitarian and equitable concerns of the Hawaii supreme court evidenced in the *Kawauchi* decision were perverted by Ellis for his own

unscrupulous benefit.

That first renewal of the option expired, unexercised, in December of 1975. Ellis therefore requested and obtained from the ever-trusting Corey a second agreement to extend the option, by which the option would continue until December 31, 1976. Simultaneous with this extension and in order to take even further advantage of Corey's faith and trust in all of his financial maneuvers with the Inn property, Ellis prepared a Listing Agreement between himself, Upland Investments and Corey, by which there would be joint efforts by Ellis and Corey to find a buyer for the Inn, and providing for the division of any proceeds received from any sale that occurred during the period of the listing. In his testimony, Ellis described the concept of the Listing Agreement as a "partnership format," which is contrary to his "mortgage" theory of Corey's interests in the property; i.e., that Corey was merely a usurious mortgagee with no fee rights in the land.

Like the 1975 option extension, the Listing Agreement also expired on December 31, 1976, a change insisted on by Corey. Had the Listing Agreement been signed in the form originally proposed by Ellis, it would not have terminated when the option expired. This clearly evidences Corey's belief at the time these agreements were signed, in December of 1975, that she was the owner of the Inn and that, once the rights of Ellis under the option expired, she need not obtain his approval for any sale of the Inn. Ellis' actions in agreeing to this expiration date either constituted an admission of Corey's understanding that she owned the property, or was a continuance of his attempts to deceive her into believing that she was the owner and had the right to sell the Inn once the option and Listing

Agreement expired.

The Listing Agreement, which was drafted by Ellis, identifies the interests of Corey as "owner" and of Upland Investments as "optionee." There is no reference to any ownership claims of Upland premised on a "defeasible deed" theory.

In all of his words and actions between 1971 and 1977, Ellis demonstrated either his representation that Corey was the owner of the Inn, or his deceitful efforts to make her believe that she was.

(a) Ellis had taken depreciation for the Inn improvements on his personal tax return prior to the date of the 1971 deed to Hagopian. After delivering that deed, Ellis stopped taking the depreciation.

(b) In his plan of arrangement for his August 20, 1970 bankruptcy, he was to *convey* the Inn properties and upon *conveyance* the creditors were to be paid in cash.

(c) Ellis was content to let the real property tax records and tax bills show Corey as the owner of the Inn from 1971 to 1988. Any bona fide mortgagor would object to having the government records show someone else as the owner of his property.

(d) On June 30, 1972, Ellis called upon Corey to pay \$4,954.47 on back property taxes (Exhibit 3). In 1973, Upland (Ellis controlled) requested Corey to reimburse it for \$3,000.00 expended by Upland for repairs and maintenance of the Inn premises (Exhibit 3). Corey did so. In 1974, Upland requested an additional \$12,000.00 from Corey as reimbursement for repairs and maintenance. Again, Corey obliged. On December 20, 1975 Upland requested Corey to reimburse it for \$33,000.00 more for repairs and improvements (Exhibit 3).⁶ Corey again did so, but this time

Ellis used her money (unknown to her) to pay off the debt to Quentin Smith still owed under his 1970 Chapter XII plan and secured by Ellis' repurchase option. It is entirely incompatible with Ellis' "mortgage" concept for Corey to be paying for repairs to the mortgagor's property.

(e) The December 1975 option extension drafted by Ellis refers to a 1972 transaction between Corey and Upland as a "loan" of \$5,000.00; in contrast, it refers to the \$85,500.00 paid by Corey in 1971 as the "consideration paid in cash for the purchase of said property [Lots 2 and 4]."⁶ As already noted, the Listing Agreement prepared by Ellis and signed that same day called Corey the "owner" of the property.

(f) On January 27, 1977, Ellis wrote Corey to memorialize a conversation occurring earlier that day. The language he chooses to describe his claim to the Inn seems inconsistent with the status of an owner whose property was about to be sold by a "lender" (i.e., Corey) without justification:

We discussed the theory of law that *might* prevent you from passing clear title to Loui and leave you subject to damages [to Loui] under paragraph 7 of the DROA . . . Since you have not agreed to my 1/26/77 request to defer the signing of the DROA for two weeks, . . . I would very much appreciate a hiatus in discussions on the subject while I tend to other much neglected and very pressing matters. [Emphasis supplied.]

It is to be noted that this appears to be the *first* hint of an intent on the part of Ellis to undermine Corey's

⁶ Ellis testified that this was a loan. This court finds that unbelievable.

belief that she owned the property in fee.

(g) The same lack of outrage over Corey's progress on the supposedly unauthorized contract for the sale of the Inn to the Loui's appears in the letters to Corey from Ellis on February 3, 1977, and on February 16, 1977:

Based upon the facts appearing in these two instruments [the listing agreement and option extension of 12/31/75], as applied to the pertinent law, any title company would have to determine your capacity to deliver clear title.

Ellis Exhibit 7.

Note again Ellis is not saying that she is a mortgagee. He is continuing his attempt to confuse Corey as to her property rights.

I suggest for your best interests that you promptly establish . . . an escrow and mail me a copy of the instructions.

Ellis Exhibit 8.

(h) On February 26, 1977, Ellis writes another letter to Corey about her proposed contract with the Loui's for the sale of the Inn. Again, the words he chooses are not those which would be used by an owner of property writing to someone without authority to sell it. Ellis states:

This will let you know in writing that I do not concur with your signing by 9:00 P.M., 1/27/77. Nor do I concur with the use of Security Title [as escrow]. Whether or not I concur in other terms would depend at least somewhat on how much of the net proceeds would come to Upland and on what schedule . . . I also suggest that Upland be included as a seller in any DROA. Otherwise,

under the law of Hawaii, you *might not be able* to deliver clear title. [Emphasis supplied.]

It is to be noted that here he does not state that she is a mortgagee, he is continuing his attempts to create confusion and doubt in her mind as to her title. These words and actions are, however, not inconsistent with the view that Ellis concurred at this time with Corey's claim that she owned the Inn. However, given Ellis' boastful knowledge of the *Kawauchi* decision and his prior efforts to tailor the transaction to fit within what he misconstrued as its holding, the better explanation of these words and deeds of Ellis, and the one which the court finds to be true, is that they are but a part of his continuing efforts to deceive Corey into believing that she owned the Inn, while he preserved the secret of his claim of ownership as mortgagor.

In contrast, all of Corey's actions in the period from 1970 through 1977 were consistent with her belief that she had contracted to buy the property at the auction for \$85,500.00, that the bankruptcy court had approved the auction sale, and that she had become the owner of the Inn by payment of that sum. Corey's tax returns reported the income which she received from Ellis or the Silversword Corporation subsequent to March 1, 1971 as rent, upon which she paid the 4% state general excise tax. This is particularly noteworthy since, unlike interest income which is exempt from excise tax, rental income makes the recipient subject to Hawaii's 4% general excise tax under section 237-3, *Hawaii Revised Statutes* ("HRS"). Corey paid the 4% tax on this income, as Ellis advised her to do in his March 1972 letter. (Corey Exhibit 5.) Corey also took depreciation on the Silversword Inn improvements consistently during the period from 1971

through 1987, as the lawful owner of the property was entitled to do, and as she was advised to by Ellis. Late in 1976, Ellis exercised his option to acquire Lot 4 from Corey for the price of \$2,000.00. Payment was made in 1977, and Corey reported capital gains income on her 1977 tax return for the difference between her cost for this lot, \$500.00, and the sales proceeds which she received.

When the Listing Agreement and the last of the option extensions expired on December 31, 1976, without payment of the \$250,000.00 exercise price set by oral modifications, Corey proceeded to enter into a contract with the Loui's for the sale to them of the Silversword Inn. This action was based upon her reasonable belief, induced by both the form and substance of the documents and communications which she received from Ellis, that she was the owner of the Inn and had the right to sell it at that time. Ultimately, this transaction created Corey's liability for the judgment, now in excess of one million dollars, which forced Corey into her Chapter 11 bankruptcy proceeding.

Ellis and his successor corporations have taken pains to show this court that, commencing sometime after the Louis threatened and eventually filed an action against Corey for the breach of her DROA for the sale of the Inn, Corey began to describe herself as a mortgagee. This shift from the position that she consistently took prior to 1977 when she signed the DROA with the Loui's, does not change the interpretation of the intent of the parties when she bought the property and received the deed in 1970/71. From the evidence before the court, this court finds unequivocally that Corey relied completely upon Ellis and his claimed knowledge of the law applicable to the deed and option

agreement.

As shown by Exhibit WSE-5, Ellis, on 1/26/77, was not against selling the property, he was objecting to the price and wanted a full agreement with Corey as to how much Upland (this corporation was completely controlled by Ellis) and the Silversword Inn, his "operating entity", would get out of the deal. He again hints that there may be a secret claim on the part of Upland when he says, "I also suggest that Upland be included as a seller in any DROA; otherwise, *under the law of Hawaii* you might not be able to deliver clear title. This could subject you to a suit for damages by the buyer under the terms of the DROA." The next day, 1/27/77, as shown by Exhibit WSE-6, Ellis is continuing to make a "contemporary written record of all verbal communications and respective positions." Again, he is not adverse to the property being sold, but he is complaining about the fact that *he* (not Upland or Silversword Inn) is not getting enough out of the \$575,000 sales figure. It is clear that he again had brought out his claimed knowledge of the law to convince Corey that under Hawaii's law she might be unable to give a clear title to Loui and then she would be subject to damages under the DROA.

As indicated heretofore, while Ellis maintains that he never gives advice, nevertheless, it appears that he expressed his "opinion" to Corey concerning the law and her possible liability for damages. As shown by WSE-7, on 2/3/77 Ellis is continuing his efforts to undermine Corey's belief that she owned the property and to convince her that she was but a mortgagee. It is clear that he is telling her that he owns the property, that she is but a mortgagee, and that she cannot deliver title of the property to the Loui's. As shown by WSE-

8, on 2/16/77 he is again telling Corey that she does not have a good title to the property, and she is heading for trouble if she attempts to go through with the DROA without taking care of Upland (Ellis).

After Corey had signed the DROA with the Loui's for a price which she believed was acceptable under the Listing Agreement, it was due entirely to the naive belief that Ellis was her dear and trusted friend and advisor that she tried to get out of her contract with the Loui's. She did but follow his instructions to get out of the deal by claiming she was but a mortgagee and could not deliver title. In all of her litigation with the Loui's that followed after 1977, she, through lawyers selected for her and paid by Ellis,⁷ blindly followed his claim that she was but a mortgagee.

It is to be noted that on the one occasion when it seemed that attorney Harold Chu, who had been selected by Corey, was about to advise Corey of the specious nature of Ellis' claim to the Inn, Ellis convinced Corey that she should fire him. Thereafter, the Ellis-selected and paid attorneys followed Ellis' theory.

After the litigation with the Loui's began, Ellis began to prepare and record a flurry of deeds and mortgages purporting to affect title to the Inn. In every case, the beneficiaries of these instruments was a corporation, trust, individual, or foundation formed by and owned or controlled by Ellis or by members of his immediate and controlled family. No cash ever changed hands to support these transactions, whose obvious purpose was simply to cloud the title to the Inn and to frustrate the efforts of both the Loui's and, later,

⁷ Ellis then deducted such payments from the *principal* of Corey's "loan" to him. He had never paid her any interest after March 1971, when he conveyed the property to her.

Corey, to gain control of the Inn property. As previously noted, in these post-1977 transactions with related entities, Ellis chose to denominate the instruments for the transfer of the fee title which he claimed as "deeds," not "assignments of option," and he denominated the instruments which created liens on the fee as "mortgages," not "defeasible deeds." The reason for the change in terminology is obvious; the need to deceive Corey was gone -- by the time the Loui's commenced their suit, Ellis had fraudulently influenced the friend who helped and trusted him to completely adopt his "mortgage" theory, which he could now bring out into the open. By adopting this mistaken theory and failing to honor her DROA with the Loui's, as indicated above Corey ultimately became liable to the Loui's for a judgment whose amount now exceeds one million dollars.

The validity of the claims of these successors to Ellis must depend, of course, on the validity of the Ellis claims to title under the 1970-1971 transactions. For the reasons stated below, the claims of Ellis and his successors to ownership of or liens against the Inn are without substance.

III. CONCLUSIONS OF LAW.

It remains for the court to apply the rules of Hawaii and bankruptcy law to these facts to determine the ownership of the Silversword Inn. Deeds and contracts are ordinarily given effect in accordance with the intentions of the parties. However, that intention is sometimes ambiguous. Where a deed is ambiguous, a number of rules have been developed to resolve the ambiguity.

If the parties have given a practical construction to

the ambiguity by their conduct, the deed will be given legal effect in accordance with this practical construction. *City and County of Honolulu v. Bennett*, 57 Haw. 195, 552 P.2d 1380 (1976). In the present case, both Corey and Ellis acted as if Corey was an owner and not a mortgagee during the critical period from 1970 through 1976. By mutual agreement, Corey took all the tax benefits and tax burdens of ownership. In spite of the terms of the lease of the Inn, Corey became responsible for and was called upon by Ellis to pay real property taxes, maintenance, and repair expenses for the Inn. Where Ellis or his successors spent money for those purposes, Ellis requested and obtained reimbursement from Corey. Corey alone bore the risk of loss or damage to the property, whether one refers to the market risk of depreciation in value, or to casualty loss and damage. Corey was repeatedly identified by Ellis as the owner or purchaser of the property in their private communications and in court documents which he prepared. Corey was also asked to convert her ownership interest to the interest of mortgagee under a purchase money mortgage, and declined to do so. Ellis asked Corey to sign a listing agreement as owner, controlling the terms upon which the property could be offered for sale.

In contrast, there was never any conduct by Corey suggesting any belief on her part that she was a mortgagee of the Inn until after 1977, when, for his own selfish interests, she was convinced by Ellis that she never acquired an ownership interest and was but a mortgagee.

A second rule to resolve ambiguities in connection with deeds turns upon the role of the parties in the document. In general, the ambiguity in written

documents is interpreted against their draftsman, whether the document is a contract (*U.S. for the Use and Benefit of Union Bldg. Materials Corp. v. Haas and Haynie Corp.*, 577 F.2d 568 (9th Cir. 1970); *Benham v. World Airways, Inc.*, 296 F. Supp. 813 (D. Haw. 1969)) or a deed. *State Savings and Loan Ass'n v. Kauaiian Dev. Co., Inc.*, 62 Haw. 188, 613 P.2d 1315 (1980). This rule can be justified in different ways: either as a penalty upon the person whose negligence caused the confusion, as a protection for the party who is less sophisticated in matters of law and documentation, or as an award to the less-blameeworthy of two parties where competing interpretations are equally reasonable. Ellis was the draftsman of all the relevant documents and communications, was by far the more sophisticated of the two parties, and from 1970 to 1977 completely dictated and controlled Corey's acts in connection with the property.

A third rule focuses upon the knowledge of each party concerning the ambiguity. If only one party to an ambiguous document is aware of the ambiguity and is also aware of how the ambiguity is interpreted by the other party, the ambiguity is resolved against the party who is aware of the ambiguity and the meaning attached to it by the other party. *U.S. for Use and Benefit of Union Bldg. Materials Corp. v. Haas and Haynie Corp.*, *supra*. Ellis knew that Corey believed herself to be the owner of the Inn, and encouraged her to have that belief. Corey, on the other hand, was entirely ignorant of Ellis' intent to claim ownership under the doctrine of a defeasible deed until over five years after the transaction was completed, and she did not learn the nature of his claim until after she had contracted to sell the property to the Loui's.

This court has made the factual finding that there was never a mutual intent of Ellis and Corey to make a loan secured by the Inn property. Corey's initial contact with the Inn was solely for the purpose of purchasing it at an auction sale and she paid her money for it, thinking she had done so. Though ultimately the auction sale was not concluded, nevertheless the sale of the lots to her was concluded and approved by the bankruptcy court, and on the very same terms which Corey had bid, namely, a purchase price of \$85,500.00, and Ellis led Corey to believe that the bankruptcy court had approved her purchase at the auction. No loan terms were ever discussed between Corey and Ellis, and Corey did not employ the option as a subterfuge to avoid the Hawaii laws on usury or any other laws. The option was granted solely out of compassion for and gratitude to a friend, and not as part of a scheme to exact an illegal profit or windfall in the event that the repurchase option was not exercised.

It was clear from the testimony of Ellis that he and his controlled successors in interest believed that *Kawauchi v. Tabata* mandated that every deed involving an option to repurchase be deemed a defeasible deed and must be construed as a concealed mortgage. The rule regarding a defeasible deed is not as broad as Ellis believed. Not every deed accompanied by a repurchase option is a disguised mortgage. Cf. *Swallow Ranches, Inc. v. Bidard*, 525 F.2d 995 (9th Cir. 1975); *Kawauchi v. Tabata*, *supra*, Wirtz, J., dissenting. Options to repurchase are traditional and conventional transactions, and so broad a rule as Ellis would have it would eliminate or jeopardize a useful commercial device. The majority in *Kawauchi* clearly stated: "This is no ordinary case." *Kawauchi*, *supra*,

p. 187.

In *Kawauchi*, Kawauchi's first and second mortgages on his property were about to be foreclosed. The sum of \$70,000 was required to save the property from foreclosure. The property was appraised by the court-appointed appraiser at \$160,000, and the upset price fixed at \$150,000. At the public auction, there were no bidders at that price. After the abortive public auction, another sale was ordered without an upset price, with the property advertised for sale for March 26, 1958. Kawauchi was trying to raise \$90,000 and offered a 30% premium, or \$27,000, plus 5-1/2% interest on the \$117,000. The doctor group which put up the money was told that if Kawauchi couldn't buy it back, the group "will just fall into a pot of gold", and if he did buy it back, the group would receive a fair lease rental on the property, with interest, and make a profit between \$25-\$30,000 on an investment of but \$90,000. *Kawauchi*, *id*, p. 164-65. The doctor's group funded the transaction just a few days before the foreclosure sale was scheduled, and on March 25, 1958, \$70,000 was paid into the court to estop the foreclosure sale. The remaining \$20,000 was paid to the "broker" and for improvements made by Kawauchi to the property. The property was subject to a lease for a term of 3 years from April 1, 1958, in which a portion of the rent was credited against the difference between \$90,000 and \$117,000. When the 3-year option expired, Kawauchi offered \$12,000 for an extension, the doctors refused, and notified Kawauchi that they were terminating the deal -- with a clear intent to acquire the property. The doctors wanted to fall into that pot of gold. None of those factors appear here.

Corey never expected to make a "killing". As

heretofore indicated, she thought she bought it at public auction at its fair market value, and she never expected and never got any usurious interest. When the fee option expired, she freely gave Ellis an extension. Not one of the indicia seized upon by the majority in declaring the instrument in *Kawauchi* to be a defeasible deed is found in this case. The law, as set forth by Justice Wirtz in dissent (p. 191), is still sound. While a transaction involving a deed with an option to purchase "may be declared to be a security agreement, there is a strong presumption that a duly executed, notarized, and recorded deed and lease purport to be what they appear to be. Proof negating their obvious nature must be strong, clear, and convincing." (Citations omitted.) "There is a general agreement that in order to determine whether a deed absolute on its face, together with an agreement of reconveyance, constitutes a mortgage or a conditional sale, depends entirely on the intention of the parties at the time of the consummation of the contract." (Citations omitted.)

As the *Kawauchi* court said,

In the usual case a court is left to infer from the value of the property whether the parties deemed the price to represent the value. Here there is direct evidence that they did not so regard the matter. *This overweighs all other circumstances*, including absence of personal liability on the part of the plaintiff [emphasis added].⁸

⁸ This court notes that there was never any personal liability falling on Ellis if he did not repurchase. The factor of "personal liability" was discussed at length in *Kawauchi*, p. 172-176, with the court concluding, "The absence of personal liability is a factor indicative of a conditional sale but one which may be and *in this case* is outweighed by other circumstances" (emphasis added).

After the court of appeals found that under Hawaii law, "where an absolute conveyance contains a disfearance clause, the instrument is a mortgage," and "Under Hawaii law it does not matter whether the disfearance clause appears on the face of the deed, on a separate writing, or even in a mere oral agreement," the appellate court continued, however, and stated, "We note that many jurisdictions regard the intent of the parties to be the controlling factor in determining whether a transaction is a sale or a mortgage. See, e.g., *Swallow Ranches, Inc. v. Bidart, supra*, 525 F.2d at 997-98 (collecting cases). This is the rule in Hawaii as well." The appellate court observed, "In the instant case, however, there is no indication in the record that the bankruptcy court engaged in any analysis of the facts which would bear on the intent of the parties and the true substance of the transaction." The appellate court continued: "Even though Hawaii law is settled that a deed absolute coupled with a repurchase option creates a mortgage *when the parties so intend*, the possibility exists that the bankruptcy court that approved the transaction understood it to be a sale and based its approval on that understanding." (Emphasis added.) Although the appellate court stated that

"in view of the absence of any findings as to the actual intent of the parties we must conclude that the characterization of this transaction as a sale [by Judge King] rather than a mortgage was error, [w]e prefer not to speculate as to whether, in a

From that court's analysis, this court cannot with calm assurance state what the law in Hawaii is on that subject. It appears, however, that under the circumstances of *this case*, lack of personal liability by Ellis is a factor which should weigh against his claim that his deed to Corey was a defeasible deed.

full hearing, the evidence would support a finding that the parties intended a sale." (Emphasis added.)

This court has specifically found that at all times prior to 1977 Corey thought that she had become the owner of the property, in fee, by purchasing it at the public auction on August 21, 1970. This court has found that Luna, attorney for Ellis' chief creditor, as well as Judge Tavares, were led to believe that "a deed, free and clear of all encumbrances, would be given to Mrs. Corey," and "a clear title . . . conveyed" as per Ellis' Plan of Arrangement. From the very beginning, Corey relied absolutely on all representations made by Ellis. As she testified, "I signed whenever he told me to sign because he said it was to my best interest".

This court has found that there was never a mutual intent of Ellis and Corey to make a loan secured by the Inn property. Corey's initial contact with the Inn was solely for the purpose of purchasing it at an auction sale. The nature of the putative lender's initial contact with the transaction is an important element in determining whether a deed/option is a disguised loan. *Swallow Ranches, Inc. v. Bidard, supra.* Though, ultimately, the auction was not concluded, nevertheless, the sale of the lots to her was concluded, and on the very same terms which Corey had bid, namely, a purchase price of \$85,500.00. No loan terms were ever discussed between Corey and Ellis, and Corey did not employ the option as a subterfuge to avoid the Hawaii laws on usury or any other laws. The option was granted solely out of compassion for and gratitude to a friend, and not as part of a scheme to exact an illegal profit or windfall in the event that the repur-

chase option was not exercised.

It is easy to distinguish the Hawaii cases of *Kawauchi* and *Kahau v. Booth*, 10 Haw. 332 on defeasible deeds, for they rely upon the fact that both parties actually intended the transactions to be a loan. Here, Corey and Ellis did not share such an intent.

The *Kawauchi* decision occurred at a time when the public policy of the State of Hawaii included the regulation of interest rates in commercial loan transactions through usury laws, a policy that has not been in effect since 1986. Act 137, *Session Laws of Hawaii* (1986); Section 478-4(d), HRS (1987 Supp.). Today, it is likely that the Hawaii courts would find that this repeal of Hawaii's usury laws in commercial transactions has a retroactive effect to validate even loans that were made while the usury laws were in effect. See, e.g., *Ewell v. Daggs*, 108 U.S. 143, 2 S.Ct. 408, 27 L.LEd. 682 (1883); *First Fed. Savings and Loan Ass'n v. Guildner*, 295 N.W.2d 501 (Minn. 1980). Corey's purchase was a commercial transaction involving business property. On the above basis of "no usury" alone, *Kawauchi* could be distinguished, since an important rationale of that decision was to prevent transactions which violated the spirit, if not the letter, of the usury laws, laws which have since been repealed as to commercial transactions.

However, there are even stronger reasons to find that [sic] *Kawauchi* a "grantor" needing funds, approached a "grantee" to discuss the possibility of a loan. The grantee was unwilling to extend credit, except upon terms that would violate the rate limitations under usury statutes then in effect. To accommodate their mutual goals, the "grantor" proposed as an alternative to the loan originally discussed that he

deed his property to the grantee for a "purchase price" far, far less than the property was then worth, and take back an option to reacquire it from the "grantee" at a price still substantially below the then market value, but sufficiently above the "purchase price" to allow the "grantee" the usurious interest it required. While there was no legal obligation for the "grantor" to consummate the repurchase, the "grantor" was under an economic compulsion to do so, because the "grantor" would forfeit a very substantial equity between the property's value and the option exercise price if he failed to do so. The "grantee", on the other hand, was guaranteed an illegally high profit in one form or another: if the option was not exercised, the "grantee" would reap a windfall in the form of the excess of the property's value over the consideration paid by the "grantee"; if the option were exercised, the windfall took the form of the excess of the repurchase price over the purchase price. Either way, the "grantee" bore no risk of loss, the entire risk falling upon the "grantor."

Unlike the grantee in *Kawauchi*, Corey never discussed with Ellis the prospect of making a loan, whether at a legal or an illegal rate of interest. Also unlike *Kawauchi*, the instant case does not require an exception to the rule that a disguised mortgage requires an obligation of the putative borrower to repay the "loan" in order to vindicate statutory policies against usury. However, the most significant difference between the instant case and *Kawauchi v. Tabata* is that Corey never sought nor was she promised (let alone assured of) a usurious or windfall profit. Corey bought the Inn for its fair market value; if the option were exercised on its original terms, the

exercise price would have exceeded her purchase price by only 5% per year. The exercise of the option would not have illegally or unjustly enriched Corey. Even the later versions of the option were far less profitable to Corey than they appeared, because the 20% nominal return was offset by the fact that Corey was incurring liability for and paying property taxes and other expenses of ownership (such as repairs and maintenance), without receiving any rental income pending exercise of the option. In short, in 1971 and thereafter, Corey neither contracted for nor stood to benefit from a windfall or illegal profit.

It must be recognized that *Kawauchi v. Tabata* is essentially a decision based on equitable concepts, and its application, as sought by Ellis, would be anything but equitable. *Kawauchi* was designed to protect necessitous borrowers from overreaching lenders. In the 1971 transaction, Ellis was the predator, not the prey. His intent from the outset was to convert the *Kawauchi* decision from a shield to a sword, a purpose for which this court finds it was never intended. He intended and attempted to use his secret knowledge and interpretation of *Kawauchi* to ensnare, entrap, and defraud an unsophisticated friend who meant only to help him. Just as the Statute of Frauds is a rule designed to prevent frauds and not to perpetrate them (*Dobison v. Bank of Hawaii*, 60 Haw. 225, 587 P.2d 1234 (1978)), so is the *Kawauchi* decision intended to protect borrowers from usurious lenders out for big profits but not to allow dishonest sellers to reclaim their property from unwitting buyers in fair and humane transactions.

The conclusion that Ellis and his successors cannot predicate their ownership claim on the defeasible deed

doctrine can also be reached by invoking a number of similar equitable maxims or defenses, all of which apply against them: "he who seeks equity must do equity." (*Kawauchi v. Tabata*, 49 Haw. at 187, 413 P.2d at 236) bad faith or unclean hands. The core of these related concepts is that in courts of equity, as all bankruptcy courts are (*In re Chinichian*, 784 F.2d 1440 (9th Cir. 1986)), substantial right and justice, rather than technical form, control. *In re Global Western Dev. Corp.*, 759 F.2d 724 (9th Cir. 1985). This court will not be the instrument through which Ellis and his successors consummate the 1971 scheme that he developed in bad faith.

If more reasons were needed, clearly, from 1970 to 1977, Corey was induced by Ellis to believe, and she actually did believe, that she was the owner of the Inn, and that he and his successors held merely successive options with fixed expiration dates. In reasonable reliance on this belief, after the expiration date on the final option had lapsed, Corey contracted to sell the Silversword Inn to the Loui's in January of 1977. As a result of that contract, and Corey's failure to convey, in 1984 the Loui's were given a judgment of \$750,000.00 against Corey, which liability approximates \$1.1 million as of the date of this decision. Ellis is equitably estopped to deny that Corey is the owner of the Inn, since, in selling the property she innocently and detrimentally relied upon the fact of her ownership as Ellis had theretofore repeatedly represented to her in word and deed. *Filipo v. Chang*, 59 Haw. 575, 585 P.2d 938 (1978). This principle, being endorsed by the Hawaii courts more recently than the *Kawauchi* decision, would supervene *Kawauchi* to the extent of any conflict. Since all the successors-in-title of Ellis are persons

and entities which he represents or controls or (in the case of his bankruptcy trustee) stand in his shoes, they are estopped to the same extent as he.

If the above reasons might not be deemed sufficient to justify a ruling that Corey owns the Inn, the court further concludes that if the 1971 deed to Corey could possibly be held to be defeasible, then, here, proper circumstances exist for the equitable reformation of the so-called defeasible deed into an absolute deed, so as to carry out Corey's clear understanding and intent and prevent a gross fraud and injustice upon her. *Cf. Kawauchi v. Tabata, supra* (Wirtz, J., dissenting.); *Restatement of Contracts (2d)*, § 166. No rights of bona fide third parties purchasing for value will be unfairly affected.

Last, the court finds that all persons acquiring interests in the Inn that were recorded subsequent to the recordation of Corey's notice of *lis pendens* in this proceeding in Liber 20359 of the Hawaii Bureau of Conveyances, at Page 395, are bound by this decision, pursuant to section 643-51, HRS. These parties include the current claimant of title as the successor of Ellis, the Auna Foundation (named after Ellis' wife), and the current lessee of the Inn, Ellis himself, both of whom acquired their interests subsequent to April of 1988. All other persons claiming by, through or under Ellis as a result of transactions occurring after March 1, 1971, are also bound by this decision determining Corey to be the sole and exclusive owner of the property described in Exhibit A, i.e., Lot 2, the Silver-sword Inn premises.

The court therefore concludes that the true substance and intent of the March 1, 1971 deed was to transfer the legal and beneficial title of the Silver-

sword Inn to Lillian Hagopian Corey through her nominee, and that Corey's intent was to grant Ellis a simple option to repurchase the Inn. This option was a true option, and it and its extensions lapsed on December 31, 1976. The claims to the Inn and interests of all persons which arise by, through or under transactions with Ellis or his successors after March 1, 1971 are void and of no further legal effect. Lillian Hagopian Corey is and has always been the legal and beneficial owner of the Silversword Inn since March 1, 1971. There being no just reason for delay, let a final judgment in favor of Corey be entered forthwith.

Dated: Honolulu, Hawaii, August 12, 1988.

/s/ Martin Pence
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:

LILLIAN HAGOPIAN COREY,
Debtor.

HELEN B. RYAN, TRUSTEE;
KULALANI, LTD.; FLORENCE
A. ELLIS; AUNA FOUNDA-
TION; WILLIAM S. ELLIS, JR.,
Appellants.

v.

HERBERT H.K. LOUI; ALBER-
TA K.Y. LOUI; LILLIAN
HAGOPIAN COREY,
Appellees.

No. 88-15350

D.C. No.

BK-84-0371 MP

HELEN B. RYAN, TRUSTEE;
KULALANI LTD.; FLORENCE
A. ELLIS; AUNA FOUNDA-
TION; WILLIAM S. ELLIS, JR.,
Appellants.

v.

HERBERT H.K. LOUI; ALBER-
TA K.A. LOUI; LILLIAN
HAGOPIAN COREY,
Appellees.

No. 88-15351

D.C. No.

BK-84-0371 MP

WILLIAM S. ELLIS, JR.,	Appellant.	No. 88-15595 D.C. No. BK-84-0371	
v. LILLIAN HAGOPIAN COREY,			
	Appellee.	No. 88-15778 D.C. No. CV-88-91 MP ORDER	
HELEN B. RYAN, TRUSTEE; FLORENCE A. ELLIS; AUNA FOUNDATION; WILLIAM S. ELLIS, JR.,	Appellants.		
v. LILLIAN HAGOPIAN COREY,			
	Appellee.		

Filed February 21, 1990

Before: SNEED, KOZINSKI and THOMPSON, Circuit
Judges

The petition for rehearing is denied. The full court has been advised of the suggestion for en banc rehearing and no judge has requested a vote thereon. The suggestion for rehearing in banc is therefore rejected. Fed. R. App. P. 35(b).

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re		BANKRUPTCY NO. 84-00371
LILLIAN HAGOPIAN COREY, <i>Debtor,</i>		
LILLIAN HAGOPIAN COREY, <i>Plaintiff,</i>		ADV. PRO. NO. 85-0185
KULALANI, LTD., <i>et al.,</i> <i>Defendants,</i>		
In the Matter of WILLIAM S. ELLIS, JR., <i>Debtor.</i> and HELEN B. RYAN, etc., <i>et al.</i> <i>Plaintiffs,</i>		BANKRUPTCY NOS. 72-391(3) AND 72-391(4) (Consolidated)
LILLIAN H. COREY, <i>et al.,</i> <i>Defendants,</i> and HERBERT H.K. LOUI, <i>et ux.,</i> <i>Defendants,</i> vs. KULALANI, LTD., etc., <i>Additional Counter- claim Defendant.</i>		
In the Matter of WILLIAM S. ELLIS, JR., <i>Debtor.</i>		BANKRUPTCY NO. 70-249

Filed August 29, 1988
Entered on Docket August 29, 1988

JUDGMENT

These consolidated proceedings came on for trial and hearing before the Court, the Honorable Martin Pence, District Judge, presiding, and the issues having been duly tried and a decision having been duly entered on August 15, 1988,

IT IS HEREBY ORDERED AND ADJUDGED

That LILLIAN HAGOPIAN COREY is the sole owner of legal and beneficial title to the unencumbered fee simple interest to the premises described in the annexed Exhibit A ("the Silversword Inn"), pursuant to the conveyance to her nominee, Bessie Hagopian, of March 1, 1971, recorded on March 4, 1971 in the Bureau of Conveyances of the State of Hawaii in Liber 7435 at Page 167;

That the Silversword Inn is a part of the Chapter 11 bankruptcy estate of LILLIAN HAGOPIAN COREY in Bankruptcy No. 84-00371;

That Defendants KULALANI, LTD., UPLAND INVESTMENTS, LTD., THE SWORD, INC., THE AUNA FOUNDATION, FLORENCE A. ELLIS, WILLIAM S. ELLIS, JR., individually and as putative debtor-in-possession, and HELEN B. RYAN as Trustee of the Estate of WILLIAM S. ELLIS, JR., have no valid and enforceable interest of any type in the Silversword Inn;

That the following persons have been given notice of these proceedings and have failed to appear to contest the claims of LILLIAN HAGOPIAN COREY to ownership of the Silversword Inn, and that any claims or interests of those persons as to that property are terminated by virtue of their default; Charley T. Shiraishi; Kula

469, Inc.; Silversword Corp.; William Socorelis; Marie E. Socorelis; Lei-Anne E. Grouard; Kula Gardens Associates, a Hawaii limited partnership; Robert P. Shaw; Pauline L. Shaw; Kula Olinda Associates; Grethana H. Neuhaus; R. P. Shaw; The Silversword Trust; Howard L. Holmes; Pamela S. Holmes; Ralph E. Corey; and George E. Blechta.

That all persons who acquired interests in the Silversword Inn that were recorded in the Bureau of Conveyances of the State of Hawaii after March 4, 1971, and who do not claim the Silversword Inn by, through or under LILLIAN HAGOPIAN COREY or Bessie Hago-pian hold no valid or enforceable interest in the Silver-sword Inn;

That all persons who acquired interests in the Silversword Inn that were recorded subsequent to the re-cordation of the Notice of *Lis Pendens* in this pro-ceeding in Liber 29359 at Page 395 are bound by this judgment;

That LILLIAN HAGOPIAN COREY shall have judg-ment against Defendants KULALANI, LTD., WILLIAM S. ELLIS, JR., UPLAND INVESTMENTS, LTD., and THE SWORD, INC., for the amount of \$1,918.80 and for the ownership of all legal and beneficial title to the Silver-sword Inn by virtue of the failure of those Defendants to comply with this Court's orders of August 5, 1987 and August 8, 1988 relating to discovery sanctions; and

That LILLIAN HAGOPIAN COREY recover from Defendants KULALANI, LTD., UPLAND INVESTMENTS, LTD., THE SWORD, INC., THE AUNA FOUNDATION, FLORENCE A. ELLIS, WILLIAM S. ELLIS, JR., individu-ally and as putative debtor-in-possession, and HELEN B. RYAN as Trustee of the Estate of WILLIAM S. ELLIS,

JR., her costs of action.

This judgment is a final judgment, there being no just reason for delay.

DATED: Honolulu, Hawaii, August 29, 1988.

/s/ Dorothy K. Ippongi
CLERK OF THE ABOVE-
ENTITLED COURT

APPROVED AS TO FORM:

/s/ Ivan Lui-Kwan
Attorney for Defendants
HERBERT H.K. LOUI and
ALBERTA K.Y. LOUI

[Exhibit A contains a legal description of the subject property, Lot 2, File Plan 382, etc.]

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII**

In re } Bankruptcy No.
LILLIAN HAGOPIAN COREY, } 84-00371
Debtor. } (Chapter 11)

Hearing date: September 2, 1987;
Motion for Leave to Withdraw as Counsel for Debtor,
filed by, James N. Duca, Esq.

PRESENT: James N. Duca, Esq., and Lillian Hagopian Corey. [Hearing closed to the public.]

TRANSCRIPT OF PROCEEDINGS

(Clerk calls case.)

THE COURT: The only parties in the courtroom are the clerk, Mr. Duca and Mrs. Corey.

Mr. Duca, you filed a motion to withdraw as counsel.

MR. DUCA: Yes, I have, Your Honor. I am here, Your Honor, with a heavy heart.

THE COURT: Will you come forward to the microphone, please.

MR. DUCA: I shall.

THE COURT: Not you, Mrs. Corey. Yet.

MR. DUCA: I'm here this morning, Your Honor, with very mixed feelings and a heavy heart.

Mrs. Corey and I are on good terms. I have a great deal of compassion and understanding of her plight.

I'm not here for the usual reasons of a lawyer not getting paid for his work, although I'm not getting paid for my work at present. That is not why I'm here today.

I'm not here for the reason of the lawyer being

unable to get along with his client. I like Mrs. Corey, and I feel for her.

The reason I'm here is simply that Mrs. Corey has, in my view, run out of legal remedies and is required to comply with orders of this Court. And I am required as her attorney to do so as well.

Mrs. Corey perceives that compliance with those orders will mean her financial ruination. She feels that she can obtain vindication of her rights by appealing this Court's decision to the Ninth Circuit.

This is this Court's decision on a case where the Court not only decided it against her but found that her position was so frivolous that it cited me for prosecuting that position.

That was not only this Court's decision, of course, as to the evaluation of her position. It was a decision previously reached by Judge Coil. It was a decision that was submitted to an independent examiner for review. And the independent examiner seems to have concurred.

THE COURT: That's Mr. Bocken.

MR. DUCA: That's Mr. Bocken.

Mr. Bocken did not feel it was wholly frivolous. He rated it a 1 out of 10, where a zero would be frivolous. But in his opinion, it was the next thing to being wholly frivolous.

THE COURT: Well, it was in his opinion wasting the Court's time, wasting Mrs. Corey's time, wasting any attorney's time to go ahead with it.

MR. DUCA: Mrs. Corey nevertheless wants to pursue the appeal, Your Honor.

I don't believe that my ethical duties to the Court and to the estate permit me to assist her in that. And it is for that --

THE COURT: Mr. Duca, you correctly analyze your position when you said you do not believe it is your duties to your client or your duties to the estate require you to do that.

There was once a time upon a time perhaps when that philosophy was considered correct; mainly whatever your client wanted you to do, you as an attorney should do it.

Under the new rules, under Rule 11, if you do it, both you and your client are subject to sanctions. And sanction doesn't mean a phrase, it means that you're subject to fines and other rulings of the Court, which may even cause your license to practice to be in jeopardy.

This Court right now has sent to the California committee on discipline a review of a case which was filed down here, and with a suggestion that the committee on attorneys discipline should consider suspending this attorney from practicing law for doing just almost exactly what your are now saying that your client is insisting that you do.

Under the rules now, if you as an attorney feel, and you've so stated right now, that your client's case is meritless, if you go ahead, both she and you may be subject to penalties because you did it.

Go ahead. You were correct in your statement.

MR. DUCA: Your Honor, let me clarify that.

I don't think when it was originally presented and I still don't think that my client's case was wholly meritless then.

But when there was a motion to appoint a trustee, we made an agreement after I consulted with my client during a recess that rather than risk the possibility that the Court might decide to appoint a trustee, we

would have an examiner review the case and we would abide by the evaluation of the examiner.

THE COURT: In other words, you would have an independent individual analyze for the benefit of Mrs. Corey and yourself the posture of her case, whether or not there was merit if she wanted to take the time and the money that it costs to carry on an appeal.

MR. DUCA: That is correct, Your Honor.

I do believe that any -- I have always believed that such appeal and that the complaint I've filed with this Court was a long shot, it was on the outer edge of bankruptcy jurisprudence; that there was dictum in some cases, a broad language that could be invoked if a Court was sympathetic to her situation on its facts, but that the bulk of the law would not support the position that she was espousing.

I don't think the standard was the bulk of the law. So I filed that complaint.

The Court ruled against me. It did not surprise me that the Court ruled against me on the position we were espousing.

A case that's a long shot at the trial level is an even longer shot at the appellate level.

But more to the point. As I saw it, the order appointing an examiner represented a bargain that Mrs. Corey and I made with the other interested parties in the estate.

It was our position that an examiner be appointed and that we would abide by the results of the examiner if the Court chose not to appoint a trustee. And based upon that offer, the Court did not appoint a trustee.

Now the examiner has reported, he has said that the appeal should not be pursued. He did not say it was frivolous, but he said its probabilities of success were

so low as not to justify its pursuit.

I don't feel I can go behind that decision or that stipulation. And that is why I am asking leave to withdraw.

The only issue I think that is a wrinkle here is whether it is appropriate for me to withdraw from the entire case or whether I should continue with the prosecution of the claim to recover -- to enforce Mrs. Corey's rights in the Silversword Inn.

As to that matter, I'm prepared to follow the instructions of the Court. Or if the Court should later today choose to appoint a trustee over this case, I suppose it would be the trustee's decision if and how he wants to enforce those rights.

Mrs. Corey has not in any way asked me to do something which I would consider improper with respect to the enforcement of the rights in the Silversword Inn.

I might add she is not sanguine about the prospects of successfully concluding those proceedings. Although I am.

So that I think is the only thing that takes this out of the aspect of being a relatively straightforward motion for leave to withdraw.

If the Court has questions, I'll be happy to respond. But that's all I have to offer.

THE COURT: No, not at the moment.

Mrs. Corey, will you come forward now.

MRS. COREY: Judge Pence, I'm 82 years old. And all my life, I've worked very, very hard. I'm the product of immigrants.

And I put these houses together with my own hands, all by myself. They're way out in the boondocks. They're over in Makaha, Nanakuli, Ha'ula. And

they're called junk houses.

I bought marshlands, because I had no money. I used to teach school. And so since I wasn't teaching school and we had no money, I tried to do something with my time.

And I took the marshland, and I had to have it bulldozed and I had to have it subdivided. And I had secondhand houses moved on there. And I used to have to hire moonlighters because I couldn't get anybody to go to Makaha and work. And when they came, they said they wanted cash, otherwise they wouldn't come. So I paid cash.

And I had people living there; they're welfare people. One of the places, there are eight children. And this month, they were able to pay me \$160 and that's all.

If I sell those places, those people have no place to go. These people have been with me for 15 years in these old houses.

I've put it up for sale twice, two different times. It was a multiple listing.

When they'd go to the house, my tenants wouldn't let them in, because they were afraid they would lose their home.

As far as selling, if I have to sell, it's better that I take care of it rather than a trustee. So please, Judge Pence, don't appoint a trustee.

I mean, this has been my whole life. If you take everything away from me, even my ability to do something, I think I'll go crazy. I really do. I mean, I haven't been able to sleep nights.

I haven't done anything wrong, really I haven't. I thought I bought a piece of property at a bankruptcy sale. I paid for it. I thought I was the owner. Then I

waited, waited seven years for Bill Ellis to take over. And he didn't take over.

So I tried to sell it. Then I find out that I could not hand over the property because I was not in possession of the property. Bill Ellis says I didn't own the property.

And for that reason, because I could not hand over the property, they soaked me for a million dollars.

When this first happened, when I wrote the DROA, I told them that I wasn't sure that I could go through with it, because there were some leases attached to the deed.

I showed it to Mr. Wong, who was the broker. I said if I can't get rid of these leases and Bill Ellis is a difficult person to deal with, then the thing will not go over and you cannot sue me. So I cross out paragraph 7 on the DROA, which means you can't sue me if I can't go through with it.

When I found out that Bill would not go through with it, I went immediately to Mr. Loui's M coffee shop and I said "Mr. Loui, please let me have that contract back, I cannot go through with it on account of Bill Ellis."

And he said, "Oh, no," he says, "I'll see my lawyer."

And of course his lawyer is Lui-Kwan, who is his nephew. And he's a partner of Carlsmith and Carlsmith. And they have a lot of clout. They don't have to worry about me.

And when I went to the office there of Carlsmith and Carlsmith, I told them, I called Aaron Chaney, who was the auctioneer, and I said, "Aaron Chaney, don't I own Silversword Inn?"

And he said, "No."

I said, "What do you mean I don't own it? I paid for

it."

He said, "Well, Bill went and had some sort of deal with the judge. And so you just don't own it." Bill says I'm only a mortgagee.

Well, Deaver was standing right alongside of me when that conversation took place. And Deaver said, "If I were you, I'd get myself a lawyer, preferably from a big law firm."

And Greely said, "This is a lawyer's dream, and we'll go for a million dollars."

And this is what they went for. And now I have to come up with a million dollars to pay the Louis even though I never received a penny from them, I never took a penny from them.

And so I'm in a situation if they take everything away from me, I live alone, I don't have a husband, I don't have any children, I don't have anybody here, I think --

I ended up in the intensive care unit not very long ago. And I don't want to do that again, because I'm afraid.

THE COURT: What do you mean you ended up in the intensive care unit?

MRS. COREY: Well, I got sick. I have high blood pressure because of this.

THE COURT: You went to what hospital?

MRS. COREY: Kaiser Hospital.

THE COURT: How long ago was that?

MRS. COREY: About two months ago.

THE COURT: How long were you in?

MRS. COREY: A little over a week. And I'm under doctor's care and so forth.

And if they wipe me out, if a trustee comes along and says just step aside, I'm going to take over --

I've taken care of myself for 82 years. I don't want somebody to come and take everything away. What do I have to live for? I have nothing to live for, if my hands are tied and they say we're taking everything you have and I have to go on welfare. And I don't want to go on welfare. I don't think I deserve that kind of treatment.

There are so many errors in what happened, and so many lies. Like the Louis said, that they sold their M's coffee shop because because in anticipation of Silversword. That isn't true.

There was a tailends of a lease left on that M's coffee shop. And it had been for sale for several years before I met them. So they finally sold it for \$97,000 cash to an elderly couple who were new here and they didn't know the score. They bought it from them, paid them their whole life savings and they lost everything.

And then they charged me \$80,000 for grievous mental suffering. Well, they didn't suffer. They didn't put a penny in there.

And I told them the first 24 hours that I could not go through with this, as much as I wanted to sell it.

Because I don't need Silversword Inn. I can't handle Silversword Inn. I bought that with the intentions of helping Bill Ellis. And in two years' time, he was going to buy it back from me. And that was the intention.

THE COURT: Mrs. Corey, as I listen to you, it's very clear to me that you have been hurt.

MRS. COREY: Yes. I've been very badly hurt.

THE COURT: Not by Mr. Duca. Not basically by anyone except Bill Ellis.

MRS. COREY: Yes.

THE COURT: You thought that ou had a clean deal

with Bill Ellis. But you found out too late that when it comes to real property, Bill Ellis, he weaves a pattern that no one else ever thinks about.

MRS. COREY: I know.

THE COURT: You know that. You fount it out the hard way.

You see, we're not here this moment -- We will later on this morning talk about whether a trustee should be appointed for your estate.

Now, Mr. Duca asked that he be allowed to withdraw as your attorney in the matter of your estate.

Now, you remember that somewhere along the line, you went into the bankruptcy court. Your property, whatever you had, went into bankruptcy.

MRS. COREY: Yes.

THE COURT: And that, Mr. Duca I know has explained to you all that that means. That means that whatever property you have, whatever it is, you must, quote, conserve it, do the best you can with it in order to pay off your debtor [sic].

Now, you've had your trials, you've had your trials insofar as Loui is concerned. You've had your trials, and you know what has happened in those cases. Right or wrong, whether they lied or not, unfortunately for you the rulings have come down against you.

Now, then, Mr. Duca is saying simply that insofar as the matter of appeal from the rulings in this bankruptcy action here, you wanted to appeal.

MRS. COREY: Yes.

THE COURT: And you'll remember, as Mr. Duca has pointed out, I held that the grounds which you presented your case are so weak, so useless as to waste time. And you didn't see it that way.

MRS. COREY: No.

THE COURT: Mr. Duca knew that, as he just now said, he knew all the way through and he told you that it was very, very thin, that the probabilities of winning were very poor.

Now, you yourself, because perhaps you hadn't been properly advised, and largely perhaps because you had fallen into the web of Bill Ellis, you yourself were the one at the cent of all of the troubles that you now face.

Your intentions were the best in the world. You thought that you were doing right.

You didn't have an attorney when you were dealing with Bill Ellis. You relied on Bill Ellis; wasn't that it?

MRS. COREY: I thought that he --

THE COURT: Yes, you thought so. But ther you're not the first one to whom these tragedies have happened.

Jumping a long ways to the matter of do you remember Ronald Rewald? Did you ever hear about the Ronald Rewald case?

MRS. COREY: Yes.

THE COURT: Bishop, Baldwin, Rewald, Dillingham and Wong?

MRS. COREY: Yes, I've heard that.

THE COURT: All right. There were those who believed in Ronald Rewald. And I know one woman that put all of her trust estate in Ronald REwald's hands. Over a million dollars. Down the drain. Gone. He just ate it all up.

I know another woman, the only thing she had was a house over on the other side of this island, over on the Kailua Beach side. And he convinced her to mortgage that house, Rewald convinced her to mortgage that house for about \$400,000. And she was getting, oh,

about \$2500 a month from that house. That was all she had to live on. But Rewald convinced her.

So she mortgaged the house. And Rewald gave her \$160,000 out of the \$400,000. And he took all the rest of it. It's gone down the drain.

I'm just showing you that here are those --

MRS. COREY: I didn't do it for an investment. I didn't do it for money.

THE COURT: I know. But that doesn't make any difference.

They believed in Rewald, just like you believed in Bill Ellis. And Bill Ellis misled you and got you what you thought you had, an absolute right, an absolute deed.

And the way Bill Ellis had drawn it, he said, oh, no, it's a mortgage, he doesn't have it. Do you remember?

MRS. COREY: But you see, with Bill Ellis, even if Mr. Duca wins in the foreclosure case, he said that he would only appeal it, you see. So it wouldn't do any good. Because it would be difficult to sell that if there's an appeal on it.

THE COURT: Who told you all that?

MRS. COREY: Bill Ellis.

THE COURT: Yes.

MRS. COREY: He'll appeal it, he said.

THE COURT: Yes.

MRS. COREY: But what I'm talking about now is Mr. Duca. Now, Mr. Duca says that he feels that you entered into an agreement as to whether or not you would appeal. And he told you not to appeal.

And that's why I appointed Mr. Bocken. Somebody independent. And Mr. Bocken said "Waste time appeal?" And you nevertheless said, "No. I'm going to appeal."

MRS. COREY: But Mr. Bocken left an opening, though, for appeal. And that's the opening I'm willing to take.

THE COURT: What opening do you say that he left?

MRS. COREY: Here. I'll tell you.

THE COURT: You tell me.

MRS. COREY: Here. He says -- No, that isn't it. Just a second. I'm sorry. I'm so nervous.

Here. I have it now.

THE COURT: What page?

MRS. COREY: Page 6.

"On the other hand, it is not clear that the debtor's appeal is frivolous. Both the factual and legal issues in this case are sufficiently complicated to tempt the more imaginative counsel to pursue a novel appeal to the Ninth Circuit."

Now, he's left a chink there. It isn't an absolute statement. And for that reason, I feel that I'm entitled to try. Just try, that's all.

THE COURT: Will you read the next paragraph.

MRS. COREY: "However," --

THE COURT: No. The next paragraph.

MRS. COREY: Oh.

"Viewing the above discussion in light of the anticipated costs and delays and benefits of the debtor's appeal, this examiner concludes the debtor should not pursue her appeal."

Well, that's one man's opinion, you know.

THE COURT: No, it isn't. That's not one man's opinion. What did your attorney tell you? What did Mr. Duca tell your? Did he say go ahead and appeal?

MRS. COREY: He doesn't go in for this sort of thing. He doesn't want to appeal.

THE COURT: All right. Why do you think he doesn't

want to appeal?

MRS. COREY: Well, because it's going to take time. That's why.

THE COURT: Is that the only reason?

MRS. COREY: Well, that's one of the reasons.

THE COURT: Is that the only reason?

MRS. COREY: Well, he hasn't been paid for a while, you know, too.

THE COURT: Is that the only reason? It takes time; number two, he hasn't been paid?

MRS. COREY: Yeah.

THE COURT: Are you saying now that you believe that that's why he doesn't want to go ahead?

MRS. COREY: No, but he doesn't -- He's not sure of it.

THE COURT: He's not sure of it?

MRS. COREY: Yes. He's not sure.

THE COURT: Is that what he told you, that he wasn't sure of it? Or did he tell you that he didn't think it was any good? Now, which did he tell you? Did he tell you that he didn't think you had a chance? Did he?

MRS. COREY: Well, that's what he says.

THE COURT: All right. So now you have your own attorney that tells you "I don't think you have a chance" and you have an independent, someone who's not interested in time or not interested in money, who is simply looking at your case, and he says "I don't think you should go ahead with an appeal."

Now, this is what you've run into.

This Court does not approve of using the court, using the appellate court, using this court as simply a playground, as simply a playground in which everyone that wants to can do anything he wants to in the name of, oh, I want to file this suit or I want to appeal.

MRS. COREY: But so much wrongdoing has taken place.

THE COURT: Well, wait a minute.

The courts are here to dispense what they feel is justice under the law. And if you go ahead and say "I don't care whether my case is any good or not. If I've got one chance, you can say in ten, if I have any chance at all, I'm going to do it."

Although everyone around you says it isn't worth anything. And then it comes up before this judge or any other judge or before the court of appeals. And the court of appeals says this case is no good, it's worthless and wasting our time.

And in addition to losing your case, your appeal, you would have also lost all the additional money that you had to put out for an attorney. And the Court may make you pay for the other attorney's costs.

Only about a month ago, only a month ago, Judge King in a case in which the plaintiff in a case before this Court had ordered that subpoenas be issued against someone to bring in information which had nothing to do really with the case. But nevertheless he said "I want that individual to come before the Court and bring all of the records."

Now, this is the plaintiff in the case did that. And it was so utterly wasted time, that when King held a hearing on the quashing, stopping, of the subpoenas, he assessed the plaintiff, made the plaintiff pay over \$13,000 in attorney's fees of the person, defendant, in the case.

So that you can't do these things just because you feel like it. That's what I'm showing you. You can't do it, Mrs. Corey.

MRS. COREY: But, Judge, I'm 82.

THE COURT: I know. And I'm 82 also.

MRS. COREY: Yes. How am I going to live? It means I have to give everything, my whole life --

THE COURT: Now, wait a minute. It isn't a question of how you're going to live. You are in the bankruptcy court. Now, Mr. Duca didn't put you there. I didn't put you there. You are there because you couldn't pay your debts. That's why you're there. Wasn't that why?

MRS. COREY: That was before all of this happened. That was when I was being sued.

THE COURT: Well, all right. But nevertheless, there you are. And that's the reason. You said "I want to run my own affairs." And what have you done? All that's happened is you've just gotten deeper and deeper in problems.

This is not your fault. The Court knows that. The Court knows it isn't your fault.

But all that's before me now at this time -- Later on, we may go into something else. But all that's before me at this time is whether I should let Mr. Duca drop out.

And Mr. Duca says he wants to be relieved, because he knows if he goes ahead and follows what I thought I told you a few moment ago, but I want to repeat it, he knows that if he goes ahead on your appeal, as you want him and insisted he must appeal because of that one paragraph of what was just simply a pinhole, a bit of light coming through in an otherwise dark report, he knows that the court of appeals may insist that he personally have to pay for the costs of the attorney of the Louis in this case. He personally have may have to pay that.

He knows that you too will be charged, may be

charged. And so he says, "Judge, I can't go go ahead and do as she insists. In addition, she agreed," you, you agreed -- now wait a minute -- you agreed with him that if I would not, the Judge would not appoint a trustee at that time, that you would leave it up to Bocken, the examiner, to see whether someone else will determine whether or not you have a good chance on appeal

And Bocken said one pinhole. And then he said "I don't think she should go ahead." And so an agreement was made that you wouldn't go ahead and appeal.

That was what Mr. Duca just now said, on the basis that I would not, the Judge would not appoint a trustee.

MRS. COREY: But, you know, I went out in the hall for about two minutes, and he tried to explain it to me. And I didn't understand that it would be a final thing. It would be just an opinion; that's what I thought.

Because you were there. You saw. We were there for two minutes.

And I never even heard of a bank examiner --

THE COURT: Well, I wouldn't say two minutes is all he talked to you. He talked to you longer than that.

MRS. COREY: Well, he told me that having a trustee was worse. Because he says "A trustee would just wipe you out by putting everything up for sale, and that's it, you see; and take over, and you won't have anything to say."

THE COURT: Well, was he wrong?

MRS. COREY: I don't know.

THE COURT: Because today the trustee is saying this: Today he's -- not trustee, Loui is saying you, Mrs. Corey, you haven't done anything to set up a plan as is required under the Bankruptcy Act, a plan to either liquidate, meaning sell everything, pay off your

debts, or to make it possible to continue for you to own these houses and not sell them and so forth while you're working out some plan that maybe will be approved by the Court to keep your estate unsold and intact.

MRS. COREY: Well, in that case, Judge, will Duca stay on instead of having a trustee appointed? Because he knows my case and we know each other and it won't be so difficult.

THE COURT: Well, now listen carefully. At this time, I cannot and will not rule on the matter of the appointment of a trustee. Because that comes up in about another 15 to 20 minutes.

The Louis want a trustee appointed. And you'll hear all that Loui has to say at that time.

I will not at this time enter into an agreement saying yes, if you will not go ahead with the deal, if you will tell Mr. Duca forget it, and if he will do that, I will not agree that sure, I will not appoint a trustee. I will not say that I will not appoint a trustee.

I'm not saying that I will appoint a trustee, either. I'm not deciding that now.

The only thing that's here is are you prepared at this time to say, "Mr. Duca, I accept your advice. I want you to stay on as my attorney. And I will not appeal"?

Otherwise, he says, "I must withdraw."

Now, are you prepared to do that, Mrs. Corey?

MRS. COREY: Well, he's working on the foreclosure. And so I guess it would be better for Mr. Duca to handle the whole thing.

THE COURT: Now, then, this is a decision, you see, that Mr. Duca thought you'd made, this Court thought you'd made when you said that you will go by the

advice of Bocken. Bocken says, "I don't think you should appeal."

Now, are you prepared to rely upon Mr. Duca's advice to you, "Don't appeal"? Are you prepared to rely upon the agreement that whatever Bocken said, Bocken says, "I will not appeal"?

Are you prepared to say, "All right, Judge, I will not appeal"? In which case then Mr. Duca will go ahead and represent you.

Now, what do you want to do? This is your decision.

MRS. COREY: I think I would rather have somebody that I know. And he's

THE COURT: He's been very faithful to you, hasn't he?

MRS. COREY: Oh, yeah. He's really a very nice person. THE COURT: And even though he hasn't gotten paid, he's still taken care of you, hasn't he?

MRS. COREY: Yes.

THE COURT: Now sometimes in this life there are people that you rely on because they've proved --

MRS. COREY: I don't know who the trustee would be. It may be somebody that --

THE COURT: That's right. You don't know who it is.

MRS. COREY: No.

THE COURT: So that you have a decision to make. Now, go back there and sit down with Mr. Duca, and we'll take an in-court recess and you tell him what you want him to do.

This is an in-court recess.

(Recess in court.)

MRS. COREY: Judge?

THE COURT: Yes, Mrs. Corey?

MRS. COREY: Is there any way we can reduce that million-dollar judgment down to a reasonable amount so that I can pay?

THE COURT: What did Mr. Duca tell you?

Ask him that question. Turn around now and ask him that question.

MR. DUCA: What I told her, Your Honor, is that I think she's exhausted her legal remedies to contest that judgment; and that she can ask you, but I don't think you would answer her.

MRS. COREY: You can't do it?

THE COURT: And I didn't. I didn't. Because I'm not a lawyer. I'm not a lawyer. I'm just the judge.

MRS. COREY: The judgment was for 750, and they want a million dollars now. Is there any way that we can do something about that so that I can pay it?

THE COURT: All that I would do again is simply say what does your attorney tell you.

Because I'm not an attorney. I only decide questions that come before me. I don't give advice. I can't give advice. The law says I must not give advice.

So whatever Mr. Duca tells you is what you should follow.

MRS. COREY: Is it possible, for instance, that I have just today to think about it and make up my --

THE COURT: About what?

MRS. COREY: About a trustee.

THE COURT: No, no, no. We're not yet at the trustee problem. That doesn't come up for another ten minutes.

But the only thing that I'm concerned with is are you going to follow Mr. Duca's advice regarding appeal or Mr. Bocken's statement regarding appeal? Or are you going to insist that you're going to appeal? Now,

which?

MRS. COREY: If I insist upon appeal, then what happens, Your Honor?

THE COURT: I won't guarantee what happens. But it puts your case in a different posture, in a different light.

This Court understood there was an agreement and Mr. Duca understood there was an agreement that you would not appeal. And that all came out at the time of the appointment of the trustee.

MRS. COREY: I don't know where I'm going to get a million dollars.

THE COURT: You don't have to have a million dollars today. Mr. Duca will tell you you don't have to have a million dollars.

The only problem I want an answer out of you at this time is in connection with Mr. Duca's request for leave to withdraw.

Are you or are you not going to follow his advice regarding the appeal?

Now, go back and sit down with him again and you come back and tell me what the answer is.

Take an in-court recess again.

(Recess in court.)

MRS. COREY: Judge Pence, my attorney says a trustee would cost me an awful lot of money. And the houses that I have to sell, I can only sell them on agreement of sale because the banks will not lend money on houses that are built on a stream. See, my houses are in a flood area. And so I can't get that kind of money to give to the Louis.

And I'm wondering maybe if Mr. Duca forecloses on the Silversword Inn, and if those other people wait, maybe we could hand over the Silversword Inn instead

of the million dollars. Because by that time, the Silversword Inn may be worth a million dollars.

THE COURT: My only question at this time: Are you going ahead with your appeal or not?

MRS. COREY: I would have to give up on the appeal if I go along with my attorney.

THE COURT: Well, isn't that what Mr. Duca said?

MRS. COREY: Yes.

THE COURT: What is your answer

MRS. COREY: I would have to give up the appeal.

THE COURT: Well, are you going to or are you not?

MRS. COREY: Yes. I'll just have to. I mean, I can't afford a trustee.

THE COURT: Then I understand that you have agreed with your attorney that you will not appeal.

MRS. COREY: Yes.

THE COURT: You have agreed

MRS. COREY: Yes.

THE COURT: All right.

Then, Mr. Duca, you can still retain and remain as attorney for Mrs. Corey?

MR. DUCA: I can, Your Honor.

There's one other requirement covered by your orders that I've been unable to comply with because of lack of authority from Mrs. Corey; and that is to file a plan for the disposition of the assets of her estate.

I have prepared a plan and in fact sent a copy of that plan to the Louis, who I think are the persons primarily affected by it. But I did not have authority to file it.

And I think for me to continue without violating the Court's orders would make it necessary for Mrs. Corey to agree that I can file it on her behalf.

THE COURT: Mrs. Corey, the bottom reason, the basis for the Louis' demand that a trustee be appointed

is the fact that in all the time that you've been in the bankruptcy court, in spite of the Court's order that you must do so, you have never filed a plan. Now, the bankruptcy rules provide absolutely that you must provide a plan.

Now Mr. Duca says that he has a plan that he's --

MRS. COREY: I just heard about it a short time ago, about the plan. I didn't --

THE COURT: Mrs. Corey, I hesitate to say anything else when you say you just heard about it just a few moments ago. Because the matter of the plan has been before this Court, and your failure to file a plan has been before this Court for months.

MRS. COREY: Here. I have the plan here. And it was handed to me --

About a month ago? Was it about a month ago?

MR. DUCA: I don't know.

MRS. COREY: That's the first time I ever read -- had the plan --

THE COURT: Now, then, let's get it straight, I hope, in your mind.

The basis upon which the Louis insist that a trustee be appointed, the basis upon which months ago when this issue came up before, when I appointed Bocken, that they wanted a trustee appointed is because you had done nothing. According to the records, you had done nothing to set up a plan as required under the Bankruptcy Act.

Now you say that you had a plan before you?

MRS. COREY: Yes.

THE COURT: For a month.

MRS. COREY: Yeah, I think --

THE COURT: And nothing has happened regarding that plan. It's never been filed.

MRS. COREY: Yeah.

THE COURT: So here we are with the Louis insisting again, again, that a trustee be appointed because you don't have a plan.

Now, then, if you will discuss the matter with your attorney, when we have a hearing on the matter of the appointment of a trustee, Mr. Duca may be able to make some representations to the Court regarding the fact that a plan will be filed and so forth and ask the Court to hold back appointment of a trustee pending the filing of the plan and so on like that, et cetera.

But that is a matter for you and Mr. Duca to agree upon.

Now, go back and talk to him right now.

And the Court will take an in court recess again. Go ahead, talk to him. He'll tell you what I'm saying and what I haven't said.

(Recess in court.)

MRS. COREY: Your Honor?

THE COURT: Yes?

MRS. COREY: I will agree to follow Mr. Duca's -- whatever he wants. I mean the plans that he wants.

THE COURT: Now, Mr. Duca, with that assurance are you prepared to continue to represent Mrs. Corey?

MR. DUCA: Yes, Your Honor. I think she has solved the problems that required me to file the motion.

THE COURT: Thank you very much.

Your motion for leave to withdraw is denied.

Now we'll take a recess and in about five minutes we'll take up the matter of the motion by the Louis to appoint a trustee.

Stand in recess five minutes.

(The hearing was adjourned.)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re
LILLIAN HAGOPIAN COREY, *Debtor.* } Bankruptcy No.
 } 84-00371
 } (Chapter 11)

Hearing date: May 27, 1989

Continued hearing on confirmation of plan, set by
"Order Approving Disclosure Statement and Fixing
Times for Filing Acceptances or Rejections of Plan
and Hearing on Confirmation.", filed and entered April
5, 1988; and "Motion for Continuance of Confirmation
of Plan", filed by Debtor, *pro se*

PRESENT: James N. Duca, Esq., and Lillian
Hagopian Corey. [Hearing closed to the public.]

PARTIAL TRANSCRIPT OF PROCEEDINGS

[The hearing commenced at 9:42 a.m. As a preliminary matter, the court continued the hearing to determine title to the Silversword Inn from June 8, 1988 to June 15, 1988, upon motion of Mrs. Ryan. The court then ordered all parties other than the debtor and her counsel out of the courtroom, and proceeded as follows:]

THE COURT: Let the record show that this courtroom has been cleared of all parties and persons save and except Court staff and Mr. Duca, counsel for Mrs. Corey, and Mrs. Corey herself, and the matter to be considered is the matter of whether or not counsel, Mr. Duca, should be allowed to withdraw as counsel for Mrs. Corey. Coming as this motion does, Mrs. Corey -- your other motion for change of counsel coming as "at the last minute." Mr. Duca.

MR. DUCA: Okay. Your Honor, before I comment on the merits of the motion, Mrs. Corey is having difficulty hearing your comments. Is there a way to amplify your voice?

THE COURT: Oh, yes. Is this better? Can you hear me any better?

MRS. COREY: It's better, but --

THE COURT: All right.

MRS. COREY: At my age my ears are not so good.

THE COURT: Well, you know, you and I both, Mrs. Corey, can't hear as well as once we did --

MRS. COREY: Yeah.

THE COURT: -- for different reasons, but substantially the same.

MR. DUCA: Your Honor, let me clarify. I do not have a pending request for a withdrawal here, although I do not oppose Mrs. Corey's desire to replace me if that is in fact her preference. I think there's some ambiguity as to what her preference is. It's clear that she feels that she needs a new lawyer to argue positions which I do not believe that I can argue for a variety of reasons. The new lawyer that she's requesting is Madeline Perry who is out of town right now, and will not be back -- will be returning from a European trip on June 3rd and will not be back to the office until June 6th. I -- perhaps I should be requesting to leave to withdraw in the sense that I don't feel that I am capable of honoring my obligations both to the Court and the law and my obligations to follow Mrs. Corey's instructions simultaneously. The major cause of the difficulty, as I'm sure the Court is aware, is that Mrs. Corey continues to wish to contest the Loui's claim as a creditor, and she feels that she would like to pursue the matter of this Court's ruling to -- by appeal to the

9th Circuit when that appeal becomes -- when that order becomes final and appealable. Right now it's an interlocutory order.

THE COURT: Now, if I understand it correctly -- if I understand it correctly --

MRS. COREY: Uh-huh.

THE COURT: -- Mrs. Corey is still attempting to insist that the Louis are not a creditor of her estate. Is that it, Mrs. Corey?

MRS. COREY: Right. That's right. Outside of the \$23,000.00.

THE COURT: Wait a minute.

MRS. COREY: I made a mistake, so --

THE COURT: Now, not a creditor to the extent of some \$700,000.00.

MRS. COREY: Yeah, plus the 10 percent --

THE COURT: Plus the interest and so forth.

MRS. COREY: Yeah.

THE COURT: But you are insisting that they are not a creditor.

MRS. COREY: That's right.

THE COURT: Well, I can tell you that if you or your attorneys were to present that to this Court and say that we want a hearing as to whether or not they are a creditor I would hold that that would be a frivolous -- completely frivolous matter because the Supreme Court of the state of Hawaii, as you yourself said, Mrs. Corey, the Chief Justice, himself said, -- they said, "You have to pay the Louis. Now, didn't you say that?

MRS. COREY: Yeah, but how can I when I --

THE COURT: Never mind how you can.

MRS. COREY: Yes. Yeah.

THE COURT: Never mind how you can.

MRS. COREY: Yes.

THE COURT: By that order of the Supreme Court of the state of Hawaii the Louis became a creditor and you became a debtor. Then in order to avoid paying, in order to avoid, or perhaps in order to delay, or perhaps several different reasons the Louis, in order to make sure that some steps were taken right away, to make sure that you paid that which the Supreme Court of Hawaii says, "You have to pay them whether you like it or not." Now, that's what Justice -- who was it?

MRS. COREY: Pagget (phonetic).

THE COURT: Yes, Justice Pagget. That's what Justice Pagget said to you and he said it as you reported it in unmistakable terms, "You have to pay the Louis." Now, the Louis are entitled to be paid. I know that it's painful always, anytime when anyone has to use their own funds to pay a bill so that it has been shown in the bankruptcy proceeding -- in your own bankruptcy proceeding it is shown that you have money, that you have property, that you have claims to property. The Silversword Inn. That there is -- it's been shown that there is a lot of money that you have, a lot of assets that you have and you're going to have to pay them. There's no appealing that part of your desires. I don't say your case. Appealing that to the 9th Circuit. You can't have any appeal because the Supreme Court of the state of Hawaii says you owe it. Period. And the 9th Circuit's not going to change that. There is no appeal from the Supreme Court of Hawaii on that type of a decision because there's no constitutional question involved. To you -- put it very flatly, insofar as your claim that you don't owe the Louis anything but \$23,000.00, that claim is worthless. You owe the Louis, according

to the Supreme Court, over \$700,000, and the interest, as you heard today, is running on at about \$200.00 a day that it's costing you. So if you expect to relitigate that, all it's going to cost you is the attorneys fees on top of what you already owe, the attorneys fees -- not only your own attorney, but it's going to cost you, I can tell you under the rules of Court here, if you enter any frivolous pleading or any frivolous motion saying that they don't owe you any money, they don't owe you -- I mean you don't owe the Louis some 700 plus thousand dollars and that you want the 9th Circuit Court of Appeals to look into that case, if any motion like that is filed in this Court, even by you as pro se, this Court would be forced to find that that was a frivolous motion, and be forced under the rules to say, "You'll have to pay additionally the attorney's fees of Lui Kwan for even filing that piece of paper. Now, you've advised her of that. Perhaps not as forcefully as I have.

MRS. COREY: But I --

THE COURT: I'm sure, Mr. Duca, you've told her that she's just playing with more judicial fire and she's going to get burnt. And you are.

MRS. COREY: But I don't own the Silversword Inn.

THE COURT: We're not, at this time, deciding whether you own or don't own the Silversword Inn. All that we're deciding in this matter of the bankruptcy is whether or not you're -- that the trustee is going to be able to go into your assets so that the Louis get paid.

MRS. COREY: Regardless.

THE COURT: Regardless. And if the Silversword Inn is yours you're way ahead because than you will have additional assets on top of your stocks, your money market funds, your homes, and all the rest. You'll have a lot more money. You'll be worth a lot

more.

MRS. COREY: But I have to give all that you say to Loui.

THE COURT: That's -- well, not all of that. You will if you don't own the Silversword Inn. Yeah.

MRS. COREY: That's what I mean.

THE COURT: That's right, but you --

MRS. COREY: And I have to go on welfare then don't I?

THE COURT: What's that?

MRS. COREY: Then I have to go on welfare.

THE COURT: You know, Mrs. Corey, when you went --

MRS. COREY: Because I'm not --

THE COURT: -- when you went into the deals with the Louis --

MRS. COREY: But you know --

THE COURT: -- you thought that you owned the Silversword Inn?

MRS. COREY: Yes.

THE COURT: Yeah.

MRS. COREY: But I wasn't sure -- I told --

THE COURT: You see, Mrs. Corey, if you were -- had been declared mentally incompetent -- if you had been declared not responsible for your actions we would have one situation, but you are a smart woman. You are a very intelligent woman. You are a well educated woman. And I notice over this time that you've been before me, due to your association with Ellis, who is not a lawyer but who is a wheeler and dealer with a lot of legal ideas that you have, yourself, acquired a lot of knowledge about law and legal obligations. Now, if you have to go on welfare it'll be because of what you did when you thought that you owned the Silversword

Inn, and so represented in the DROA to the Louis. That, however, -- that war -- that problem has already been chewed over and spit out by the Courts in the state, and it winds up that you owe 700 plus thousand dollars to the Louis whether you like it, whether it puts you on welfare, whether it puts you anywhere. You're going to have to pay it.

MRS. COREY: There is no way I can appeal that?

THE COURT: There is no way now that you can appeal a judgment of the Supreme Court for the state of Hawaii that you heard Paggett -- Justice Pagget say most forcefully, "You, Lillian corey, have got to pay it." There's no way you can appeal it.

MRS. COREY: He said that I had to hand over the property.

THE COURT: Well, --

MRS. COREY: On the property. I don't own it.

THE COURT: Never mind whether you hand over the property or not. There's a judgment that's already final. I didn't grant that judgment. That was done in the State Courts and I just repeat myself for the last time, you cannot appeal the fact that you owe the Louis some \$700,000.00. Period.

MRS. COREY: You mean plus the interest which means that maybe a million and a half or something like that?

THE COURT: If you don't pay it it just keeps piling on, piling on. If it gets up to a million and a half, or two million, or three million, --

MRS. COREY: But --

THE COURT: -- so long as it's unpaid the interest keeps running.

MRS. COREY: But how about the argument that's made -- may I read you a statement of the argument?

THE COURT: All right, you read me the argument that you would make.

MRS. COREY: We're asking for a continuance of this plan that they have, and I object to the plan because it provides for payment of the Louis judgment which is void because the State Court lacked jurisdiction.

THE COURT: Well, now, you stop right there. You can stop right there.

MRS. COREY: May I just finish the --

THE COURT: All right, I'll let you finish it, but you might as well stop.

MRS. COREY: "The State Court" --

THE COURT: It's all over right now.

MRS. COREY: "The State Court ordered me to deliver possession of the Silversword Inn to the Louis. The Court did not have jurisdiction to order me to give possession because the Silversword inn was in possession of Mr. Ellis, who was in bankruptcy, and who was not a party to the State Court suit. All of the Louis judgment, except \$23,000.00 is for damages because I could not deliver possession and therefore the balance is void."

THE COURT: I know that's your argument.

MRS. COREY: Well, --

THE COURT: I will state to you, Mrs. Corey, that argument is worthless. It borders on the frivolous because the judgment was that you owe some \$700,000.00 because you couldn't deliver the property. And the reason, as you know and I know, you couldn't deliver the property was because Ellis had made a deal with you one way and you thought it meant that you owned the property, and he said, "Oh, no." That he had the right to buy it back, and the Court of Appeals held that that constituted sort of a mortgage so that it would --

document instead of a deed that you thought you were getting. This is all Ellis and his wheeling and dealing and you happen to be the sucker for it. I heard you say that you relied upon his advice and you see where his advice put you. It put you into the Court here today with me telling you that you're stuck. You're stuck for the \$700,000.00 because there's no appeal, no appeal whatsoever from that judgment of the State Court. Whether you claim they didn't have jurisdiction or they did have doesn't make any difference. That judgment is there and you're stuck on it, and you're going to have to pay it.

MRS. COREY: Well, when the lawyers say I have a chance to go to the 9th Circuit Court -- don't I have any kind of a chance to go to the 9th Circuit Court?

THE COURT: Oh, sure, you can go to the 9th Circuit Court from anything that occurs here. As to who owns the Silversword Inn, you can go to that, but you can't go to the 9th Circuit Court on the basis that you don't owe the Louis \$700,000.00 plus. You can't. That is not an issue in this Court. I've already -- already it's clear that the Louis are a debtor -- I mean are a creditor, and you owe them the money, and they have a right to make the claim against whatever property you own, just like any other debtor/creditor relationship.

MRS. COREY: Well, isn't there any mercy Isn't there any --

THE COURT: This is not a question of mercy at this time. The mercy is all gone. Mercy ended up down in the Supreme Court to the state of Hawaii. All that they said at that time, --

MRS. COREY: No, I --

THE COURT: -- "We don't care what property you have or don't have, you owe Loui 700,000 plus dollars.

MRS. COREY: But if you knew the circumstances under --

THE COURT: The circumstances at this moment are meaningless, they're worthless, they're of no account. You owe the money.

MRS. COREY: But if I couldn't handle -- hand them possession of the property, then that's the impossibility --

THE COURT: Did you understand what I've said 17 times?

MRS. COREY: Yes.

THE COURT: You owe the money. Now, --

MRS. COREY: But I'm going to try though --

THE COURT: What are you going to try?

MRS. COREY: I'm going to try -- I'm going to try to go up to the 9th Circuit Court and see if I can persuade them that I wanted to hand over the property but I couldn't. It was an impossible situation.

THE COURT: Well, I'll tell it to you all over again.

MRS. COREY: No, no.

THE COURT: I'll tell it to you all over again. If you file a motion like that for attempting in this Court to get a redetermination in this Court of what was decided down in the State Supreme Court not only will you have to pay your own attorney for fighting it, but you will also have to pay for the attorney's bills, the Kwan's, on top of everything else in resisting it. Did you hear that? So if you want to spend your money --

MRS. COREY: But can this wait until we find out who owns the Silversword Inn?

THE COURT: Can what wait?

MRS. COREY: This paying Loui. Can't we wait and see who owns the Silversword Inn?

THE COURT: Now, you see we're completely off the

subject.

MRS. COREY: Oh.

THE COURT: The matter of continuing the approval of the plan is something later on. At this time we're only concerned with whether or not Mr. Duca is going to be released as your attorney. I am sure that Mr. Duca told you the same thing that I told you, that you're stuck. But you didn't want to be stuck so you wouldn't believe him, and so that you wanted to go ahead and get a new attorney at the last minute to try to avoid paying what you're going to have to pay sooner or later. Now, do you want to get rid of him or not?

MRS. COREY: Well, if I can have a new attorney. Can I get a -- can I have a new attorney? Can I have Ms. Perry? She wants --

THE COURT: You can hire anybody you want.

MRS. COREY: Uh-huh.

THE COURT: You can dismiss him if you want.

MRS. COREY: Yeah, I mean to say do I have to dismiss him if I hire Ms. Perry?

THE COURT: Well, what do you have in mind? Do you want two attorneys?

MRS. COREY: I don't know.

THE COURT: Do you want two attorneys

MRS. COREY: But I don't know. She hasn't come here and you haven't accepted her yet so I don't know.

THE COURT: Well, it's pretty simple -- Well, I told you. You can have all the attorneys you want.

MRS. COREY: Oh. I mean if she comes back here can she be my attorney?

THE COURT: Well, she can be your attorney anytime if you want to pay her.

MRS. COREY: Yeah, and what she's asking for is a continuance.

THE COURT: I know that. I haven't ruled on the matter of continuance.

MRS. COREY: Yes. That's it. I have to find out what you rule on that -- the continuance so that she can prepare the case for me.

[THE COURT:] Well, presupposing I don't grant the continuance, what are you going to do?

MRS. COREY: When you -- you say I can't hire an attorney.

THE COURT: I said you can. You can hire any attorney you want to.

MRS. COREY: But I mean can -- will you give her a chance to kind of prepare something for me?

THE COURT: Suppose that I say I'm not going to continue this matter of your bankruptcy and the approval or disapproval of the plan. What are you going to do?

MRS. COREY: Well, can I wait and see what your going to do first?

THE COURT: Just suppose -- now, just suppose that I don't give you that additional time. Suppose that I decide that because you come in at the last moment and ask for a new -- that this matter be continued because you want to get a new attorney, and I hold that it appears to the Court that all you're doing is the same thing that's been done time and again in this case, trying to sell it along in order to avoid paying what somewhere down the line you're going to have to pay, that you're asking this Court to --

MRS. COREY: Well, you know --

THE COURT: -- Continue it so you can continue to lose about \$200.00 a day.

MRS. COREY: You know I'm wiped out anyhow and --

THE COURT: Well, you're wiped out. So that's too bad.

MRS. COREY: \$200.00 a day doesn't matter one way or the other because I won't have anything anyhow.

THE COURT: Well, if you have the Silversword Inn, you do.

MRS. COREY: Yes, but I don't have it.

THE COURT: This is one of the problems that when you get into --

MRS. COREY: I --

THE COURT: -- big business deals you may lose a lot of big bucks, and this is what happened to you.

MRS. COREY: I know, but I can't lose anymore than I have, --

THE COURT: All right, so you're not worried about the --

MRS. COREY: -- and I have to pay -- if I have to pay Loui then I have to pay my attorney there won't be anything anyhow.

THE COURT: All right, so you're not concerned about how much money's involved.

MRS. COREY: Well, I mean --

THE COURT: Insofar as your attorneys, or Louis, is that right?

MRS. COREY: But I mean to say it's all going to be wiped out anyhow.

THE COURT: Well, I say you're not concerned about that.

MRS. COREY: Well, naturally I'm concerned. I'll have to go on welfare. That's all.

THE COURT: All right. I'm not -- that isn't all right. Nobody wants to see anybody go on welfare, but if that's the way it is you will go on welfare. That's -- it has to be. If the wheel --

MRS. COREY: I --

THE COURT: -- if the wheel of fortune rolls that way

that's --

MRS. COREY: I'd like to wait --

THE COURT: -- That's the way it's going to be.

MRS. COREY: I would like to wait until it's decided as to whom the Silversword Inn belongs.

THE COURT: I'm not saying whether I would or would not. We're only concerned at this time -- do you want Mr. Duca relieved now, you want him relieved at the end of this hearing?

MRS. COREY: At the end of the hearing

THE COURT: You want Mr. Duca out at the end of the hearing today. Is that it?

MRS. COREY: Well, I know, but if I -- I would like it -- to have some other attorney see if that attorney can do anything for me.

THE COURT: You mean --

MRS. COREY: I mean --

THE COURT: -- you're asking --

MRS. COREY: Or could I have --

THE COURT: -- you're asking this matter be delayed?

MRS. COREY: Yes, please.

THE COURT: -- until your attorney -- everything be delayed until your attorney comes back.

MRS. COREY: Please. Please. Just do that much for me, Judge. Please. Because I'm not in a position to make a decision right now.

THE COURT: You know, --

MR. DUCA: Your Honor, may I interject?

THE COURT: Yes, you may.

MR. DUCA: I think Mrs. Corey's decision process would probably be effected by her knowledge whether or not this Court would appoint -- would authorize successor counsel to prosecute an appeal to the 9th

Circuit. I think this --

THE COURT: Appeal from what?

MR. DUCA: Well, what we've been talking about all along. If this Court were not prepared to give that kind of authorization she may find that there wasn't a point in getting a successor counsel.

THE COURT: Maybe you didn't understand me.

MRS. COREY: I don't understand --

THE COURT: Maybe you didn't understand what I've been saying regarding this matter of appealing the judgment of the Supreme Court that you owe the Ellis's -- I mean owe the --

MRS. COREY: But what I was trying --

THE COURT: Wait a minute.

MRS. COREY: Oh.

THE COURT: Maybe you didn't understand what I was saying regarding your idea that you would like to appeal the judgment of the Supreme Court of the state of Hawaii in favor of the Louis to the 9th Circuit. That's what you want?

MRS. COREY: Yes.

THE COURT: I'll tell you in different words this time. If your attorney, I don't care who your attorney is, files a motion in this Court, or a pleading in this Court asking that the matter be referred to the Court of Appeals of the 9th Circuit that motion would be thrown out by me instantly number one. I wouldn't even waste my time. Without even a hearing it'd be dismissed as frivolous because you can't do it.

MRS. COREY: Now, we had an examiner examined and he said that this was not frivolous.

THE COURT: What was not frivolous?

MRS. COREY: This case.

THE COURT: I didn't say this case was frivolous, I

said your idea --

MRS. COREY: Well, that --

THE COURT: -- That you can appeal the judgment of the Supreme Court of the state of Hawaii in favor of the Louis against you, that you can appeal that.

MRS. COREY: I'd like to appeal --

THE COURT: But --

MRS. COREY: I would like to appeal what went on in getting that judgment. This is what I'd like to appeal.

THE COURT: Well, I'm telling you the same thing in different words. You can't appeal what went on in getting that judgment because the judgment erased in one way, or took into consideration everything that went into the matter of your debt --

MRS. COREY: But you know, --

THE COURT: -- to the Louis.

MRS. COREY: -- Your Honor, when these people came over and wanted to -- the Silversword Inn I told them that I --

THE COURT: Now, I'm shutting you up because all you're doing is doing the same thing that you did when the Louis sued you. You went through all of that, and you testified to all of that, didn't you? Down in the State Courts.

MRS. COREY: Yes.

THE COURT: And what happened?

MRS. COREY: All right, now, if Mr. Lum -- Judge Lum had allowed me to go ahead and have a jury trial this never would have happened.

THE COURT: I've read your affidavit and I simply say that all that Judge Lum did or didn't do, all that you did or didn't do with the Louis, all of that is water that's gone to the sea and become salt. It's gone. It's finished. The only thing that's left is you owe them

that money. Period. You can't bring up -- and I'm telling you, you can't bring up any evidence about how that the Louis happened to get into this lawsuit -- that lawsuit with you. You can't bring that up. You can't take it up to the --

MRS. COREY: He --

THE COURT: 9th Circuit.

MRS. COREY: His attorneys said "This is a lawyer's dream," and they manufactured the case --

THE COURT: Whose attorney?

MRS. COREY: Loui's.

THE COURT: All right. Why did he say, "This is a lawyer's dream."?

MRS. COREY: It was Deaver and Greely that said, and I went over there the very first day, 24-hour period, and --

THE COURT: You're talking about way back before the judgment.

MRS. COREY: What?

THE COURT: Your talking about --

MRS. COREY: Before --

THE COURT: -- way back --

MRS. COREY: Before --

THE COURT: -- in the beginning.

MRS. COREY: Yeah, very beginning.

THE COURT: Save your time and save my time. I told you, I won't even listen to it. I won't even listen to it. That is dead. That's gone. That has nothing to do with the fact that you owe them and the Supreme Court has said that you owe them because the Supreme Court, and Lum, and everybody else heard all of this evidence --

MRS. COREY: You mean --

THE COURT: -- that you want to --

MRS. COREY: You mean that --

THE COURT: -- talk about now.

MRS. COREY: -- the Supreme Court is just playing God regardless. Is that it?

THE COURT: You're gone. It's gone regardless. I told you it's gone down to the sea.

MRS. COREY: Well, I say the Supreme Court is just God and whatever they say you cannot touch.

THE COURT: In this --

MRS. COREY: Is that it?

THE COURT: In this case, on these facts. You've said it.

MRS. COREY: But you know, --

THE COURT: The Supreme Court of the state of Hawaii is God. In your case.

MRS. COREY: Is God.

THE COURT: Is God. And there's no appeal from judgment of the Supreme Court, God in your case, regarding your debt to the Louis.

MRS. COREY: Even though what they did was --

THE COURT: There is no even thought. God has spoken.

MRS. COREY: How about as --

THE COURT: You're dead.

MRS. COREY: How about these people that have things turned around and so forth?

THE COURT: Yes, but that's other people and other cases. Your attorney told you all this. I'm just repeating what he told you, and the only reason I'm doing it is because I'm trying to drive it home to you the realization that you have to pay that which the Supreme Court of the --

MRS. COREY: Can I --

THE COURT: -- state of Hawaii --

MRS. COREY: Can I --

THE COURT: -- said you have to pay.

MRS. COREY: Can I wait to find out about the Silver Sword Inn before --

THE COURT: That's another problem. Do you want this attorney to represent you, or do you want -- or not?

MRS. COREY: Yeah, I want him to represent me on the Silver Sword Inn to see who owns that property.

THE COURT: Well, do you want him to represent you in this matter which is now going on before me? Namely the bankruptcy matter in which you're involved.

MRS. COREY: Yes. I want him to represent me in the matter of who owns Silversword.

THE COURT: That's -- what I asked you this time, I said do you want him to keep on representing you --

MRS. COREY: Yes.

THE COURT: -- in the matter of this bankruptcy? All these hearing going on now?

MRS. COREY: Yes.

THE COURT: Do you want to take it?

MR. DUCA: Yes, Your Honor.

THE COURT: All right. Anything else you want to say, Mr. Duca?

MR. DUCA: Yes, Your Honor. Although I believe I made clear to the Court that -- particularly by not filing objections to the plan that I believe that the confirmation of this plan is in Mrs. Corey's best interest and that I find no legal basis to object to the plan. I think it's my duty to Mrs. Corey to advise the Court of what I see as the best argument that she could make with respect to her desire to continue to appeal to the 9th Circuit, which is not the same as my saying that I

thing this argument is likely to succeed or even that I personally endorse it, but because of the divergence of opinions between myself and her and her lack of legal knowledge I should alert the Court to one authority that may support the position that she's urging and that came down subsequent to the examiner's report. On September 30th of 1987 the 9th Circuit Bankruptcy Appellate Panel decided the case of *In re: Shuman* which is reported in 78 Bankruptcy Reports 254. Shuman said that "A trustee of Chapter 7 estate" --

THE COURT: Liquidation, yes.

MR. DUCA: -- "is not precluded from asking the Bankruptcy Court to reexamine defenses unsuccessfully raised by the debtor and adjudicated in a pre-bankruptcy proceeding."

THE COURT: Do you know the facts in that case?

MR. DUCA: Your Honor, the facts are stated very sketchily and I don not purport to claim that the case is indistinguishable from this. I mean I raise it because I think it's the best argument that Mrs. Corey could make and if she winds up with successor counsel she ought to have her record preserved in case she wants to question anything that happens at today's hearings, and that's the only reason I bring it to the Court's attention.

THE COURT: Well, even though, in that case the Bankruptcy Appeal Board may have found something in that case which warranted that statement, I will stand by everything I've said.

MR. DUCA: Okay. I --

THE COURT: Including the matter of frivolousness.

MR. DUCA: Well, as I indicated, I did not raise it to argue --

THE COURT: I know. I know.

MR. DUCA: -- with the Court's ruling.

THE COURT: I know. I know. Thank you very much. Call in --

MRS. COREY: Will you consider that ? Will he consider that?

THE COURT: Call in everybody.

[The other interested parties were allowed back into the courtroom and the hearing continued. The court confirmed the plan which provided for the sale of the Silversword Inn with the proceeds to pay the Loui's judgment.]

ROBERT C. MARVIT, M.D., INC.
SUITE 510, THE VARSITY BUILDING
1110 UNIVERSITY AVENUE
HONOLULU, HAWAII 96826

TELEPHONE: 941-4707

July 7, 1986

CONFIDENTIAL

James Duca, Esquire
220 S. King Street, 19th Floor
Honolulu, Hawaii 96813

Re: Lillian Corey

STATEMENT OF THE PROBLEM:

This is an 81 year old woman who is being evaluated for her mental and emotional state at the time of a 1979 trial, and its effects on her ability to meaningfully represent her interests at that trial.

CURRENT EXAMINATION

She was preliminarily examined on June 24, 1986. Mental status examination revealed a woman with no overt evidence of psychotic thinking in the form of logical thought disorder. She was depressed, anxious and angry, but overly controlled and engaged in a fair amount of obsessional thinking. She saw a psychiatrist a few months ago at Queen's Medical Center. This was Doctor Holtzgang. This was relevant to the screening in a hypertension clinic and depression. He wanted to give her some medication but she refused. She had one visit.

In 1968 her husband left her for a Korean bar girl. This was an extremely upsetting condition. She was divorced in 1973. He left her for this other woman, but they ultimately didn't marry. Her husband was Ralph Corey, an attorney. Bill Ellis was a very close friend and did research apparently for her husband. The divorce was an extremely traumatic experience. It carried over a period of five years from 68 to 73 as a result of property settlement issues. She had a variety of lawyers which were selected for her and suggested she simply give up on a number of her rights. She was fed up with the litigation process, and ultimately changed lawyers in a variety of ways. She is of Armenian decent and didn't want to hurt her husband. She married him when he was in the service. They have no children. She invested in run down property in rural areas in part as an investment and part in a philanthropic [sic] manner to provide housing for the poor. She describes herself as a "babe in the woods". She felt that she was substantially taken advangaged [sic] of by Mr. Ellis and the attorneys. She went into a rather lengthy description of the confused nature regarding the purchase of this property in Maui and her inadequate understanding of the process. This was also coincident with her trauma regarding the divorce. She was advised to get an attorney right after she signed the contract. She didn't want to think about it. She was concerned about her husband, at the same time not adequately protecting her own interests.

She believed that the judge would protect [sic]. She wanted a jury trial in order to be able to tell her side of the story, but was talked out of it. Apparently her ability to understand the ramifications of the litigation and to express in a cogent manner the facts was inade-

quate to the task. As a result she has gotten into a substantial amount of difficulty regarding judgments against her.

At the present time she has taken a Minnesota Multiphasic Personality Inventory which indicates a high level of clinical depression, difficulty in concentrating and making decisions, as well as a need for emotional support and pessimistic attitude.

She is currently suffering from depression, low morale, interpersonal conflicts, oversensitivity, insecurity, shyness, moodiness, and a need to feel in control and doing things perfectly well. There is no evidence of psychotic thinking in the form of persecutory ideas, delusions, bizarre sensory experiences. Her recollection of specifics and dates although clear, does not necessarily represent precision or accuracy. She apparently was sued in 1977 with a trial in 1979 for this breach of contract. Her attorney withdrew before the trial, and she went to represent herself in an extremely naive and simplistic manner. She had an \$800,000 judgment go against her with various appeals. From her mental status it did not appear that she was capable of understanding the issues and making a fair presentation. She was a former school teacher and has a somewhat [sic] grandiose notion of her own abilities.

She was approached by this William Ellis who was this family friend as stated for assistance in bidding on a foreclosure. She was supposed to get a lease back and got a deed from this man, but the deed had a lease with an option to repurchase which was to expire in 1976. He apparently did not perform on this contract, and in 1977 signed a contract for sale of the property but realized that she may not have had clear title and asked for payment and an escape for non performance

clause. She thought that she had protected herself, and when Ellis said that she had only a mortgage, not ownership she couldn't quite understand that. When she told the people she sold it to that she couldn't perform they said they were going to sue her. She felt that Ellis was her confident [sic], and wouldn't harm her. She has realized since then that he is extremely clever and able to use others to his own purpose. At the time she was not capable of providing an objective job of analyzing her own interests. Her relationship with Ellis, her dependency, the divorce all entered into her lack of effective understanding and follow-through. Her understanding of the past seven years in the court [sic] with judgments against her have only added to her confusion and difficulties.

It is my preliminary analysis that at the time of these transactions she was not emotionally and mentally capable of representing her own interests properly, and even at this point in time it's not clear that she has an adequate grasp of the factors necessary to promote her interests in the manner which would provide for a full and fair due process hearing.

She will be followed up with neuropsychological testing, and further clinical assessment to clarify issues that surround the judgmental capacities which would be necessary to reconstruct an appropriate representation of her interests at that time, and subsequent to those events.

Sincerely yours,
/s/ Robert C. Marvit, M.D.

RCM:jt

No. 89-1840

Supreme Court, U.S.

FILED

JUN 21 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

KULALANI, LTD., *et al.*

Petitioners,

v.

LILLIAN HAGOPIAN COREY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF IN OPPOSITION OF RESPONDENTS
COREY AND LOUI**

PAUL MAKI
KESSNER, DUCA & MAKI
220 South King Street
Suite 1900
Honolulu, Hawaii 96813
(808) 522-1900
Counsel for Respondents
Lillian Hagopian Corey,
Herbert and Alberta Loui

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. 89-1840

KULALANI, LTD., *et al.*,
v. *Petitioners,*

LILLIAN HAGOPIAN COREY, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF IN OPPOSITION OF RESPONDENTS
COREY AND LOUI**

To The Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States

The Respondents, Lillian Corey and Herbert and Alberta Loui, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 892 F.2d 829 (9th Cir. 1989).

**COMMENTS ON INACCURACIES IN
STATEMENT OF FACTS**

The petition misleadingly presents some pertinent facts, when it repeatedly characterizes the activities of the trial court as *ex parte* communications with Corey. A careful reading of the petition reflects that these supposed *ex parte* communications did not consist of unofficial or off-the-record contacts between Corey and the trial judge. They consisted of proceedings that were

quite properly held *in camera*: the first being a September 2, 1987, hearing on the motion of Corey's court-appointed counsel for leave to withdraw¹ and the second being a May 27, 1988, hearing on Corey's motion for a continuance of the hearing on the confirmation of the plan so that she could obtain additional counsel.² Since both proceedings could be expected to turn upon privileged or confidential matters discussed between Corey and her counsel, and since the issue raised by those motions (i.e., Corey's legal representation) did not directly affect any other party-in-interest, the court quite properly excluded from the courtroom everyone except Corey, her counsel, and the court personnel. It then conducted a hearing on the two motions *on the record*.

The intimation that Corey and the trial judge were collaborating behind the back of the other parties as to contested issues is wholly unwarranted. The communications in question were part of the court's conduct of its official business, on the record and in the customary way for matters of that type and sensitivity.

Finally, there is one additional factual matter as to which the this Court should be aware in assessing the petition. As explained below, at the trial level, none of the petitioners argued that 28 U.S.C. Section 455(a) created an exception to the extrajudicial source rule. The only petitioner who alluded to this argument in the Circuit Court was William Ellis, *pro se*. Mr. Ellis held no interest in the Silversword Inn property at the time that Respondent Corey filed her petition under Chapter 11 of the Bankruptcy Code, and was dismissed from Corey's adversary proceeding relating to that property (at his own request, *see Appendix A*) on that basis. Ellis never subsequently presented evidence that he later acquired an interest in the Inn. Long after Corey com-

¹ Petition at 13.

² Petition at 9.

menced litigation to assert her claim to the Silversword Inn and long after a Notice of Pending Action as to Corey's claim had been filed, Petitioner Kulalani deeded its interest in the Inn to Petitioner Florence Ellis, who immediately deeded it to The Auna Foundation. These transactions occurred within seven weeks of the trial of Corey's ownership claims. *See Appendices B and C* (admitted into evidence by Petitioner Auna at the trial). The deed to Petitioner Auna refers to a 1987 lease on the premises originally held by Kula 469, Inc. and assigned to Ellis on April 13, 1988, two months before the trial. Then, without formally seeking or obtaining leave to intervene into that trial,³ Ellis appeared at trial *pro se* to contest Corey's ownership claim. This last-minute maneuvering to interject himself into a case from which he had been dismissed at his own request two years prior provides a shaky foundation from which to argue that the judgment after trial should be vacated because of the appearance of partiality against *him*.

REASONS WHY THE PETITION SHOULD BE DENIED

Pursuant to Rule 15.1, Lillian Corey, the Appellee below, asks this Court to deny the petition for a writ of certiorari for three reasons:

1. There is no conflict among the circuit courts of appeal with respect to the application of 28 U.S.C. Section 455(a) to the "extrajudicial source" rule.
2. The issues presented could not be decided on their merits because the substantial consummation of the bankruptcy plan of Lillian Corey and the sale of the asset in dispute (the Silversword Inn) has made the issues moot.
3. Neither the decision below nor the record raises the Question Presented in the petition as to the effect of 28 U.S.C. Section 455(a) on the "extrajudicial source" rule.

³ *See Petitioners' Appendix, p. 16, n.4.*

These arguments are presented below. With the exception of the Petitioners' erroneous assertions as to a conflict among the circuits, the Petitioners do not claim that any of the considerations mentioned in Rule 10.1 of this Court's rules on the granting of certiorari apply.

I. CERTIORARI IS NOT REQUIRED TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS.

The Petitioners assert a conflict among the circuits as to the construction of 28 U.S.C. Section 455(a) that does not exist. All circuits agree that bias or prejudice arising from a judicial source is ordinarily not a basis for disqualification under the statute. All circuits which have addressed the issue also agree that, in exceptional cases where a judge's performance of her official functions has led to "pervasive bias," disqualification under Section 455(a) may be required. This is the law in the Ninth Circuit and was probably the law in effect even prior to the 1974 amendments enacting Section 455(a).⁴

In the First Circuit, *United States v. Giorgi*, 840 F.2d 1022 (1st Cir. 1988) held that "disqualification for personal bias or prejudice necessitates a showing that the alleged bias be both personal and extrajudicial." *Id.* at 1035. "Although the knowledge of a defendant gained during a judicial proceeding *may* [emphasis in original] present grounds for a reasonable person to question a judge's impartiality, . . . mere exposure to prejudicial information does not . . . establish the requisite factual basis." *Id.*

The Second Circuit has adopted the requirement that bias must be extrajudicial, but has never addressed the possibility of an exception to the requirement for extreme cases of bias from a judicial source. *In re Inter-*

⁴ See, *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed. 532 (1970) (the due process clause prohibits a trial judge who has been vilified by a defendant from presiding over the defendant's subsequent trial for contempt).

national Business Machines Corp., 618 F.2d 923 (2d Cir. 1980); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307 (2d Cir. 1988), cert. denied, 109 S.Ct. 2458 (1989). The state of the law is similar in the Fourth Circuit. The Fourth Circuit believes that

“doubtless it is true that neither an appellate nor a trial judge is disqualified from sitting in a case because of an earlier decision in which he participated, of a similar case involving other parties The principle that the source of the bias or partiality must be extrajudicial, however, has always had its limitations.” *Rice v. McKenzie*, 581 F.2d 1114, 1117-18 (4th Cir. 1978).

One exception precludes a federal judge from reviewing his own decision on the merits while he was a state judge. *Id.*; *United States v. Parker*, 742 F.2d 127 (4th Cir. 1984), cert. denied, 469 U.S. 1076, 105 S.Ct. 575 (1984). The possibility of another exception for “pervasive bias” has not been addressed in the Fourth Circuit.

In the Third Circuit, the Court tends toward the view that Section 455(a) changes only the standard which district judge is to apply in reviewing disqualification motions, and that extrajudicial bias is still an essential requirement. *United States v. Vespe*, 868 F.2d 1328 (3d Cir. 1989). Whether an exception would be implied in the case of “pervasive bias” arising from judicial sources has yet to be established there.

While the Fifth Circuit recognizes that Section 455 generally requires disqualification for bias only where the bias has an extrajudicial source, *In re Beard*, 811 F.2d 818 (5th Cir. 1987), it has also recognized an exception for “pervasive bias and prejudice” shown by judicial conduct. *United States v. Phillips*, 664 F.2d 971, 1003 (5th Cir. 1975). Similarly, in the Sixth Circuit, “impressions based on information gained in the pro-

ceedings are not grounds for disqualification in the absence of pervasive bias." *In re M. Ibrahim Khan, P.S.C.*, 751 F.2d 162, 164 (6th Cir. 1984). The same approach is taken in the Eighth Circuit, *Davis v. C.I.R.*, 734 F.2d 1302 (8th Cir. 1984), in the Ninth Circuit, *United States v. Monaco*, 852 F.2d 1143 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 864 (1989), in the Tenth Circuit, *United States v. Page*, 878 F.2d 1476 (10th Cir. 1989) and in the Eleventh Circuit. *Jaffe v. Grant*, 793 F.2d 1182 (11th Cir. 1986), *cert. denied*, 480 U.S. 931, 107 S.Ct. 1566, 481 U.S. 1051, 107 S.Ct. 2186 (1987).

The Seventh Circuit views the term "personal" bias as meaning bias from an extrajudicial source. *United States v. Balistreri*, 779 F.2d 1191 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095, 106 S.Ct. 1490 (1986). As in the Second, Third and Fourth Circuits, the Seventh Circuit has yet to determine whether to recognize an exception for bias arising from judicial sources that is "pervasive."

Certiorari therefore need not be granted to resolve conflicts in principle among the circuit courts. Such conflicts do not exist, although some circuits have no precedent on the question whether there is a "pervasive bias" exception to the "extrajudicial source" requirement. The Ninth Circuit's decision in this case neither created nor expanded such a conflict.

As discussed in Section III, *infra*, the Petitioners did not argue for nor support any claim to the "pervasive bias" exception in the lower courts. However, even if one assumed that the Ninth Circuit committed error in the instant case by failing to consider whether the circumstances qualified for the "pervasive bias" exception, this is not a matter of national significance. The application of established standards of disqualification to the facts below in a case involving only property rights is not a matter of national import, and is therefore unworthy of this Court's attention.

II. CERTIORARI IS IMPROVIDENT BECAUSE THE APPEAL IS MOOT.

Certiorari should not be granted where relief on the merits is moot. The instant appeal is moot for two reasons: (a) the bankruptcy plan from whose confirmation the appeal has been taken has been substantially consummated; and (b) the Silversword Inn (i.e., the real property whose title was the primary subject of the appeal below) has been sold during the pendency of the appeals, pursuant to 11 U.S.C. Section 363.

When no stay is obtained from an order confirming a bankruptcy plan and the plan is substantially consummated during the pendency of an appeal, the appeal becomes moot and subject to dismissal. *Miami Center, Lta. Partnership v. Bank of New York*, 820 F.2d 376 (11th Cir. 1987), *reh'g denied*, 826 F.2d 1010 (1987), *vacated on denial of reh'g*, 838 F.2d 1547, *cert. denied*, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986). The mootness rule in bankruptcy developed from two principles: the general rule that the occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot, and the particular need for finality in bankruptcy. *In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172 (9th Cir. 1988).

In the instant case, substantial consummation of the bankruptcy plan has taken the form of the debtor's cash payment of \$200,000 to her unsecured creditors (the Louis) and her conveyance pursuant to the plan, by general warranty deed, of the Silversword Inn property whose title was the subject of this litigation. In exchange, the Louis have recorded a satisfaction of judgment with respect to the 1984 judgment (and judgment lien) which they obtained against the debtor. Appendices D and E. This satisfaction of the \$1.2 million claim of the Louis' allowed in the bankruptcy proceeding was approved by the bankruptcy court on February 21, 1990, after a hear-

ing conducted on February 12, 1990, which Petitioner Ellis did not attend. Appendix F.

In addition to the mootness issues arising from the substantial consummation of the plan, mootness results from Section 363(m) (i.e. 11 U.S.C. Section 363(m)) of the Bankruptcy Code. The effect of this Section is that "when an order confirming a sale to a good-faith purchaser is entered and a stay of that sale is not obtained, the sale becomes final and cannot be reversed on appeal." *In re Stadium Management Corp.*, 895 F.2d 845, 847 (1st Cir. 1990), quoting *In re Saco Local Development Corp.*, 19 B.R. 119, 121 (Bankr. 1st Cir. 1982). Absent a stay, the court must dismiss a pending appeal as moot because the court has no remedy that it can fashion even if it would have determined the issues differently. *In re The Charter Co.*, 829 F.2d 1054 (11th Cir. 1987) (*per curiam*), cert. denied, 485 U.S. 1014, 108 S.Ct. 1488, 99 L.Ed.2d 715 (1988); *In re Sax*, 796 F.2d 994 (7th Cir. 1986). Corey's sale of the Inn to the Louis while the appeal was pending cannot be reversed or impugned by vacating the judgment below as to her ownership of the Inn.

The circuit courts have applied the provisions of Section 363(m) even where the purchaser at the sale was a party to the appeal, so long as the purchase was not subject to statutory rights of redemption. *In re Onouli-Kona Land Co.*, *supra*; *Markstein v. Massey Assoc., Ltd.*, 763 F.2d 1325 (11th Cir. 1985); *In re Bel-Air Assoc., Ltd.*, 706 F.2d 301 (10th Cir. 1983).

In the instant case, although the Petitioners requested stays of the various orders of the bankruptcy court from that court, from the Ninth Circuit, and from Justices O'Connor and Stevens, no stays were issued.

Consequently, the granting of certiorari in the instant circumstances would be improvident. It would involve the Court in the process of evaluating the merits of an appeal which was subject to dismissal for mootness.

III. CERTIORARI IS IMPROVIDENT BECAUSE THE PETITIONERS DID NOT RAISE BELOW THE ISSUES WHICH THEY NOW SEEK TO ARGUE.

The issue of general application which the petition seeks to raise is whether 28 U.S.C. Section 455(a) changed the requirement that the source of disqualifying bias or prejudice must be extrajudicial. Because the claim that 28 U.S.C. Section 455(a) modified or eliminated the requirement of an extrajudicial source of bias was not presented at all in the trial court or meaningfully presented in the circuit court, this would not be a proper case for the exercise of this Court's discretionary power of appellate review.

The first time Section 455(a) was invoked in the trial court by any of the Petitioners was the suggestion of recusal filed on August 19, 1988 by only one of the Petitioners, William Ellis. Ellis' suggestion makes no reference to any exception to the general requirement that any actual bias of the court have an extrajudicial source. The authority on which Ellis relied consisted solely of *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), a case decided nineteen years before the 1974 amendments which created the current Section 455(a).

The trial court's denial of this suggestion for recusal cited this Court's decision eleven years after *Murchison*, namely, *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), for the requirement of an extrajudicial source of the bias. The issue whether an exception to that requirement might exist for bias so pervasive as to make it appear that the trial judge could not impartially sit in judgment was neither raised nor addressed in the trial court.

On November 4, 1988, Ellis (but none of the other Petitioners) again raised the issue whether recusal was proper under Section 455(a). As before, Ellis did not argue that bias derived from a judicial source can be a

basis for disqualification under Section 455(a). Instead, he claimed that Judge Pence was disqualified by virtue of bias arising from an extrajudicial source:

"The 'wheeler and dealer' bias against the undersigned [Ellis], as expressed by Judge Pence in *ex parte* colloquy with the Debtor on May 27, 1988 [proceedings on Corey's request for a continuance to replace her counsel] is clearly 'a bias that is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings.'"
Appendix G. (The quotation is from *Johnson v. Trueblood*, 629 F.2d 287 (3rd Cir. 1980)).

The November suggestion of recusal then cites and quotes extensively from *Knapp v. Kinsey*, 232 F.2d 458 (6th Cir. 1956), *reh'g denied*, 235 F.2d 129, *cert. denied*, 352 U.S. 892, 77 S.Ct. 131, 1 L.Ed.2d 86 (1956), another case decided long before the current Section 455(a) was enacted. Finally, the recusal pleading concludes that

". . . [T]he Honorable Martin Pence has clearly indicated by all of the conduct described above quotation from *Knapp v. Kinsey*, a *personal* (i.e., extrajudicial) bias and prejudice which mandates a *sua sponte* recusal pursuant to Section 455(a) and/or 455(b)(1)

This extrajudicial bias and prejudice is respectfully challenged by invoking the Congressional mandate of Section 455" [Emphasis in original.]

The trial court's decision on the November suggestion for recusal correctly understood it as another claim that the court was biased from an extrajudicial source, and found that all sources of alleged bias relied on by Ellis were judicial sources:

"The alleged bias and prejudice—if there was one, but the alleged bias and prejudice could have arisen solely out of judicial proceedings. The motion for recusal is denied." App. at 31.

The disqualification issue raised and decided twice at the trial level was not the one now raised by the petition, i.e., "the applicability of the 'extrajudicial source' rule to § 455(a)." *Petition* at 20. The only issue at the trial level was whether the source of the bias was extrajudicial.

The Petitioners' appellate record is similarly deficient on the question which the Petitioners now seek to present to this Court by way of their petition. The Petitioners filed three sets of briefs in the Ninth Circuit, one set for each of the appeals decided in the Ninth Circuit's 1989 opinion. The opening briefs of Petitioners Ryan, Kula-lani, Florence Ellis and Auna make no reference whatsoever to Section 455(a), nor to any exception which the 1974 legislation may have created to the "extrajudicial suorce" requirement. One of the opening briefs of William Ellis *does* make reference to Section 455, but repeats the contention rejected below: that Judge Pence had a personal bias derived from an extrajudicial source:

"The *in camera* proceedings on September 2, 1987 and May 27, 1988, . . . were 'something other than rulings in the case' and were, therefore 'extrajudicial' [citations omitted]

Judge Pence was mandated . . . to be especially solicitous in maintaining the appearance and reality of impartiality and proceed no further in matters involving Ellis vs. Corey because of his personal, extrajudicial bias or prejudice against Ellis and in favor of Corey." (C.A. Nos. 88-15351 and 88-15595, Ellis O.B. at 43, 46.)

Finally, as an afterthought and without benefit of citation to any of the legislative or judicial authority on which he now attempts to rely in the petition, the Ellis brief contains a one-sentence argument that

"Even if Judge Fence, by his rationale, should not be extrajudicially biased or prejudiced against EL-LIS and in favor of COREY, the record on appeal

would indicate to any reasonable person the unmistakable *appearance* of partiality." *Id.*, O.B. at 46. [Emphasis in original.]

No citation to the cases from the jurisdictions which Ellis now claims to be in conflict with Ninth Circuit precedent was set forth, nor did Ellis cite the Ninth Circuit's own decision in *United States v. Monaco*, 852 F.2d 1143 (9th Cir. 1988), which expressly refers to the "pervasive bias" exception to the extrajudicial source requirement. In his briefs below, Ellis also failed to discuss the relationship of this argument to *United States v. Grinnell Corp.*, the decision of this Court on which both Judge Pence and the Ninth Circuit ultimately relied. Ellis similarly failed to address the question of legislative intent in connection with the 1974 amendments of 28 U.S.C. Section 455. Instead, Ellis cited only the Ninth Circuit's decision in *In re Manoa Finance, Inc.*, 781 F.2d 1370 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 98 L.Ed.2d 997, *reh'g denied*, 480 U.S. 941, 107 S.Ct. 1594, 94 L.Ed.2d 783 (1987), a decision which is not even mentioned in the petition for certiorari.

Being presented with no argument in the trial court and no ruling by the trial court on the claim that the "extrajudicial source" rule was inapplicable to Section 455(a), and hearing no meaningful argument on the issue at the appellate level, the Ninth Circuit's decision from which this petition is taken failed to address the argument. The opinion of the Ninth Circuit does not refer in its discussion of judicial bias to Section 455(a), and therefore does not establish any conflict with the rule which Ellis claims the circuits have divided on: that there are exceptional circumstances in which Section 455(a) would require recusal even if the trial court's bias arises exclusively from judicial sources. The Ninth Circuit's opinion addresses only the issue which was presented to and decided by the trial court:

"In this case, the record shows clearly that, to the extent the learned district judge was inclined to rule against Appellants, this was the product of his knowledge of the facts of the case gained during judicial proceedings, not of extrajudicial information." App. at 21.

Before this Court is called upon to address the Question Presented relating to Section 455(a), it should have the benefit of a fully developed record below. Instead, the petition seeks to present to this Court an issue that was not presented at all to the trial court, was merely hinted at in the briefs below and was never discussed by the Court of Appeals. This is grounds for the denial of certiorari. *Equal Employment Opportunity Comm'n v. Federal Labor Relations Bd.*, 476 U.S. 19, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986). The resolution of the legal issue raised by the petition should be reserved for a case in which the matter has been squarely raised and decided below.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL MAKI
KESSNER, DUCA & MAKI
220 South King Street
Suite 1900
Honolulu, Hawaii 96813
(808) 522-1900
Counsel for Respondents -
Lillian Hagopian Corey,
Herbert and Alberta Loui

APPENDICES

22010135448

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

Adversary Proceeding No. 85-0185

In re Case No. 84-00371
Chapter 11

LILLIAN HAGOPIAN COREY,

Debtor

LILLIAN HAGOPIAN COREY,

Debtor,

vs.

KULALANI, LTD., *et al.*,

Defendants.

NOTICE OF DISMISSAL OF AFFIRMATIVE
CLAIMS AND WITHDRAWAL OF ANSWER TO
AMENDED COMPLAINT

Pursuant to Bankruptcy Rule 7041, applying Rule 41 (a) (1) (i), F.R.Civ.P., Defendant WILLIAM S. ELLIS, JR., hereby dismisses without prejudice those Affirmative Claims contained within Answer to Amended Complaint by Defendant William S. Ellis, Jr., Containing Affirmative Claims, filed herein on June 23, 1986.

Defendant also hereby withdraws without prejudice said Answer to Amended Complaint filed June 23, 1986, and, by way of response to the Amended Complaint, relies instead upon Notice of Automatic Stay of Actions Against Defendant William S. Ellis, Jr., and Request

2a

to Be Dropped as Party, filed herein on September 12,
1985.

DATED: Honolulu, Hawaii, December 16, 1986.

/s/ William S. Ellis, Jr.
WILLIAM S. ELLIS, JR.
Defendant, pro se

Certificate of Service: I hereby certify service of a copy of this paper upon counsel for the Debtor and upon Helen B. Ryan, Esq., Walter R. Schoettle, Esq., and Ivan M. Lui-Kwan, Esq., by mail or delivery on December 16, 1986.

/s/ William S. Ellis, Jr.
WILLIAM S. ELLIS, JR.

APPENDIX B

Recordation Requested by: FLORENCE A. ELLIS

After Recordation, Return to:

FLORENCE A. ELLIS
RR 1, BOX 428A
Kula, Hawaii 96790

Return by MAIL

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That KULALANI, LTD., a Hawaii corporation, of Honolulu, Hawaii, hereinafter called the "Grantor," for and in consideration of the sum of ONE MILLION DOLLARS (\$1,000,000.00) and other good and valuable consideration to it in hand paid by FLORENCE A. ELLIS, wife of William S. Ellis, Jr., whose residence and post office address is RR1, Box 428A, Kula, Hawaii 96793, hereinafter called the "Grantee," the receipt whereof is hereby acknowledged, does hereby grant and convey unto the Grantee, and to her heirs, personal representatives, and assigns, all of the Grantor's beneficial interest in and to the following described property:

ALL of that certain parcel of land situate on Haleakala Road (FAP 5B) at Omaopio, Kula, District of Makawao, Island and County of Maui, State of Hawaii, being a portion of L.C.Aw. 281-B to Ali, being more particularly described in File Plan 382 as Lot 2, 4.05 acres, and bearing Tax Map Key designation 2nd Div. 2-3-20:11.

BEING that certain parcel of land conveyed to the Grantor by Warranty Deed dated September 1, 1980, and recorded in the Bureau of Conveyances of the State of Hawaii in Liber 14970 at page 588.

SUBJECT, HOWEVER, to the following:

1. The rights of native tenants as reserved in Land Commission Award 281-B to Ali.
2. The lien of the State of Hawaii for payment of commutation, if any, as provided in Section 172-2, HRS, no Patent having been issued to Ali, the Awardee under Land Commission Award 281-B.
3. That certain Grant dated October 5, 1960, in favor of Maui Electric Company, Ltd., granting a perpetual easement over, across, through, and under said Lot 2 for utility purposes, recorded in said Bureau in Liber 3936 at page 39.
4. That certain first mortgage in favor of LILLIAN H. COREY, unmarried, in the form of a defeasible deed dated March 1, 1971, vesting legal title in Bessie Hagopian, recorded in said Bureau in Liber 7435 at page 167, assigned to the said first mortgagee by instrument dated July 1, 1973, and recorded in said Bureau in Liber 9808 at page 315, the terms and provisions of said mortgage, sums secured thereby, and the interest paid and accrued thereunder being set forth with particularity in that certain Declaration of First Mortgage dated September 1, 1977, and recorded in said Bureau in Liber 12552 at page 231 (amended Liber 12569 at page 106), as supplemented by affidavits recorded in said Bureau in Liber 12568 at page 108, Liber 13306 at page 636, and Liber 14097 at page 380.
5. That certain Amended Second Mortgage in favor of RALPH E. COREY and UPLAND INVESTMENTS, LTD., dated August 15, 1984, and recorded in said Bureau in Liber 19176 at page 567.
6. That certain Amended Third Mortgage in favor of WILLIAM S. ELLIS, JR., dated December 1, 1980, and recorded in said Bureau in Liber 19176

at page 562 (the successor mortgagee being, by operation of law, HELEN B. RYAN, Trustee for the estate of William S. Ellis, Jr., Debtor, in BK No. 72-391, USBC Hawaii).

7. That certain Fourth Mortgage in favor of LEI-ANNE E. GROUARD, et al., dated December 1, 1980, and recorded in said Bureau in Liber 18291 at page 50; assigned to WILLIAM S. ELLIS, JR., as Debtor-in-Possession, BK No. 72-391, USBC Hawaii, by instruments of even date herewith and recorded in said Bureau in Liber 21931 at pages 122 and 124.

8. That certain Second Amended Indenture of Lease by and between the Grantor, as Lessor, and KULA 469, INC., Lessee, dated January 1, 1987, and recorded in said Bureau in Liber 20604 at page 544, assigned by the Lessee to WILLIAM S. ELLIS, JR., as Debtor-in-Possession, BK No. 72-391, USBC Hawaii, by instrument dated April 13, 1988, and recorded in said Bureau in Liber 21894 at page 271.

TO HAVE AND TO HOLD the same, together with improvements thereon and the rights, easements, privileges, and appurtenances thereunto belonging and appertaining, unto the Grantee, her heirs, personal representatives, and assigns, forever.

AND THE GRANTOR hereby covenants with the Grantee that it is lawfully seised in fee simple of the above granted premises and that it has good right to sell and convey the same; that the same are free and clear of encumbrances except as aforesaid and real property taxes; and that it will and its successors and assigns shall **WARRANT** and **DEFEND** the same unto the Grantee, her heirs, personal representatives, and assigns, against the lawful claims of all persons, except as aforesaid.

IN WITNESS WHEREOF, the undersigned Grantor has caused these presents to be duly executed as of the 1st day of May, 1988.

KULALANI, LTD.

By /s/ **William S. Ellis, Jr.**
WILLIAM S. ELLIS, JR.
Its President

STATE OF HAWAII)
)
) ss.
CITY & COUNTY OF HONOLULU)

On this 18th day of May, 1988, before me appeared WILLIAM S. ELLIS, JR., to me personally known, who, being by me duly sworn, did say that he is the Vice-President of KULALANI, LTD., a Hawaii corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said WILLIAM S. ELLIS, JR., acknowledged said instrument to be the free act and deed of said corporation.

/s/ [Illegible]
Notary Public, State of Hawaii

My commission expires: 7-26-89

APPENDIX C

Recordation Requested by: THE AUNA FOUNDATION

After Recordation, Return to:

THE AUNA FOUNDATION
1088 Bishop St., Suite 1105
Honolulu, Hawaii 96813
Telephone: 521-0382

Return by PICK-UP

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That FLORENCE A. ELLIS, wife of William S. Ellis, Jr., of Kula, Maui, Hawaii, hereinafter called the "Grantor," for and in consideration of the sum of TEN DOLLARS (\$10.00) and other good and valuable consideration to her in hand paid by THE AUNA FOUNDATION, a Hawaii nonprofit corporation, whose principal office is at 1088 Bishop Street, Suite 1105, Honolulu, Hawaii, hereinafter called the "Grantee," the receipt whereof is hereby acknowledged, does hereby grant and convey unto the Grantee, and to its successors and assigns, all of the Grantor's beneficial interest in and to the following described property:

All of that certain parcel of land situate on Haleakala Road (FAP 5B) at Omaopio, Kula, District of Makawao, Island and County of Maui, State of Hawaii, being a portion of L.C.Aw. 281-B to Ali, being more particularly described in File Plan 382 as Lot 2, 4.05 acres, and bearing Tax Map Key designation 2nd Div. 2-3-30:11.

BEING that certain parcel of land conveyed to the Grantor by Warranty Deed of even date herewith and intended to be recorded concurrently herewith.

SUBJECT, HOWEVER, to the following:

1. The rights of native tenants as reserved in Land Commission Award 281-B to Ali.
2. The lien of the State of Hawaii for payment of commutation, if any, as provided in Section 172-2, HRS, no Patent having been issued to Ali, the Awardee under Land Commission Award 281-B.
3. That certain Grant dated October 5, 1960, in favor of Maui Electric Company, Ltd., granting a perpetual easement over, across, through, and under said Lot 2 for utility purposes, recorded in said Bureau in Liber 3936 at page 39.
4. That certain first mortgage in favor of LILLIAN H. COREY, unmarried, in the form of a defeasible deed dated March 1, 1971, vesting legal title in Bessie Hagopian, recorded in said Bureau in Liber 7435 at page 167, assigned to the said first mortgagee by instrument dated July 1, 1973, and recorded in said Bureau in Liber 9808 at page 315, the terms and provisions of said mortgage, sums secured thereby and the interest paid and accrued thereunder being set forth with particularity in that certain Declaration of First Mortgage dated September 1, 1977, and recorded in said Bureau in Liber 12552 at page 231 (amended Liber 12569 at page 106), as supplemented by affidavits recorded in said Bureau in Liber 12568 at page 108, Liber 13306 at page 636, and Liber 14097 at page 380.
5. That certain Amended Second Mortgage in favor of RALPH E. COREY and UPLAND INVESTMENTS, LTD., dated August 15, 1984, and recorded in said Bureau in Liber 19176 at page 567.
6. That certain Amended Third Mortgage in favor of WILLIAM S. ELLIS, JR., dated December 1, 1980, and recorded in said Bureau in Liber 19176 at

page 562 (the successor mortgage being, by operation of law, HELEN B. RYAN, Trustee for the estate of William S. Ellis, Jr., Debtor, in BK. No. 72-391, USBC Hawaii).

7. That certain Fourth Mortgage in favor of LEI-ANNE E. GROUARD, et al., dated December 1, 1980, and recorded in said Bureau in Liber 18291 at page 50; assigned to WILLIAM S. ELLIS, JR., as Debtor-in-Possession, BK No. 72-391, USBC Hawaii, by instruments of even date herewith and recorded in said Bureau in Liber 21931 at pages 122 and 124.

8. That certain Second Amended Indenture of Lease by and between KULALANI, LTD., Lessor, and KULA 469, INC., Lessee, dated January 1, 1987, and recorded in said Bureau in Liber 20604 at page 544, assigned by the Lessee to WILLIAM S. ELLIS, JR., as Debtor-in-Possession, BK No. 72-391, USBC Hawaii, by instrument dated April 13, 1988, and recorded in said Bureau in Liber 21894 at page 271.

TO HAVE AND TO HOLD the same, together with improvements thereon and the rights, easements, privileges, and appurtenances thereunto belonging and appertaining, unto the Grantee, its successors and assigns, forever.

RESERVING, HOWEVER, unto the Grantor a life estate in and to the rents, issues, and profits of the above granted premises, up to and including THREE THOUSAND DOLLARS (\$3,000.00) per month, cumulative, from the date hereof.

AND THE GRANTOR hereby covenants with the Grantee that she is lawfully seised in fee simple of the above granted premises and that she has good right to sell and convey the same; that the same are free and clear of encumbrances except as aforesaid; and that she will and her heirs and assigns shall WARRANT and DE-

FEND the same unto the Grantee, its successors and assigns, against the lawful claims of all persons, except as aforesaid.

IN WITNESS WHEREOF, the undersigned Grantor has hereunto set her hand as of the 1st day of May, 1988.

/s/ Florence A. Ellis
FLORENCE A. ELLIS
Grantor

STATE OF HAWAII)
) ss.
CITY & COUNTY OF HONOLULU)

On this 18th day of May, 1988, before me personally appeared FLORENCE A. ELLIS, to me known to be the person who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed.

/s/ [Illegible]
Notary Public, State of Hawaii
My commission expires: 7-26-89

11a

APPENDIX D

SECURITY TITLE CORPORATION

HEREBY CERTIFIES THAT THE ATTACHED IS

A TRUE COPY OF THE ORIGINAL DOCUMENT

FILED IN THE BUREAU OF CONVEYANCES

OF THE STATE OF HAWAII

AS REGULAR SYSTEM DOCUMENT NO. 90-055529

ON April 19, 1980 AT 1:35 p.m.

By: /s/ [Illegible]

LAND COURT SYSTEM REGULAR SYSTEM

AFTER RECORDATION, RETURN BY MAIL () PICKUP ()

Security Title Corporation

WARRANTY DEED

Grantor:

LILLIAN HAGOPIAN COREY, individually
and in her capacity as debtor in possession in
Case No. P4-0071, United States Bankruptcy
Court for the District of Hawaii

Grantee:

HERBERT LOUI and ALBERTA LOUI,
husband and wife

PROPERTY DESCRIPTION:

Lot 2, portion of L. C. Aw. LIBER: 9808
281B, Omaopio, Kula, Maui, PAGE: 315
Hawaii

WARRANTY DEED

THIS DEED, made this 22nd day of March, 1990, by LILLIAN HAGOPIAN COREY, individually and in her capacity as debtor-in possession in Case No. 84-0071, United States Bankruptcy Court for the District of Hawaii, of Honolulu, Hawaii, hereinafter called the "Grantor", and HERBERT LOUI and ALBERTA LOUI, husband and wife, whose residence and post office address is 1644 Ulupii St., Kailua, Hawaii 96734, hereinafter called the "Grantees",

WITNESSETH:

That in consideration of the sum of TEN AND NO/100 DOLLARS (\$10.00) and other valuable consideration paid by the Grantees, the receipt of which is hereby acknowledged, the Grantor does hereby grant, bargain, sell and convey unto the Grantees, as Tenants by the Entirety, with rights of survivorship, and the survivor of them and his/her heirs and assigns, in fee simple:

All of that certain parcel of land situate at Omaopio, Kula, County of Maui, State of Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof.

And the reversions, remainders, rents, issues and profits thereof and all of the estate, right, title and interest of the Grantor, both at law and in equity, therein and thereto;

TO HAVE AND TO HOLD the same, together with all buildings, improvements, rights, easements, privileges and appurtenances thereon and thereto belonging or appertaining or held and enjoyed therewith, unto the Grantees according to the tenancy herein set forth, forever.

AND, in consideration of the premises, the Grantor does hereby covenant with the Grantees that the Grantor is seized of the property herein described in fee simple; that said property is free and clear of and from all liens and encumbrances, except for the lien of real property taxes not yet by law required to be paid, and except as may herein specifically be set forth; that the Grantor has good right to sell and convey said property, as aforesaid; and, that the Grantor will WARRANT AND DEFEND the same unto the Grantees against the lawful claims and demands of all persons, except as aforesaid.

The rights and obligations of the Grantor and the Grantees shall be binding upon and inure to the benefit of their respective estates, heirs, personal representatives, successors, successors in trust and assigns. All obligations undertaken by two or more persons shall be deemed to be joint and several unless a contrary intention shall be clearly expressed elsewhere herein.

The conveyance herein set forth and the warranties of the Grantor concerning the same are expressly declared to be in favor of the Grantees, as Tenants by the Entirety, with rights of survivorship.

This sale is made pursuant to 11 U.S.C. Section 363 (f) and the order of the United States Bankruptcy Court entered on February 21, 1990, in said Case No. 84-00371.

The terms "Grantor" and "Grantees", as and when used herein, or any pronouns used in place thereof, shall mean and include the masculine or feminine, the singular or plural number, individuals or corporations and their and each of their respective successors, heirs, personal representatives and assigns, according to the context thereof. If these presents shall be signed by two or more Grantors or by two or more Grantees, all covenants of such parties shall for all purposes be joint and several.

IN WITNESS WHEREOF, the Grantor has executed these presents on the day and year first above written.

/s/ Lillian Hagopian Corey
LILLIAN HAGOPIAN COREY,
both individually and as
debtor-in possession

Grantor

STATE OF HAWAII)
)
) ss:
CITY AND COUNTY OF HONOLULU)

On this 22nd day of March, 1990, before me personally appeared LILLIAN HAGOPIAN COREY, individually and as debtor-in possession, to me known to be the person described in and who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed.

/s/ Kenneth K. Gakai
Notary Public, State of Hawaii
My commission expires: 1/18/93

EXHIBIT "A"

ALL of that certain parcel of land situate on the Haleakala Road (Federal Aid Project 5B) at Omaopio, Kula, County of Maui, State of Hawaii, being a portion of L.C.Aw. 281B to Ali, and being more particularly described in File Plan 382 as follows:

LOT 2: BEGINNING at a $\frac{3}{4}$ " pipe at the northwest corner of Lot 2 and on the east side of Haleakala Road, F.A.P. 5B, the coordinates of which point referred to H.G.S. Trig. Station "Puu Pane" being 10493.0 feet south and 3064.8 feet east, and running by azimuths measured clockwise from true south:

1. $285^{\circ} 59'$ 438.47 feet along the Roman Catholic Mission's portion of L.C.Aw. 281B to Ali to a $\frac{3}{4}$ " pipe;
2. $8^{\circ} 46' 30''$ 359.46 feet along Lot 3 of L.C.A. 342 to a $\frac{3}{4}$ " pipe;
3. $98^{\circ} 45' 30''$ 473.45 feet along Lot 3, Lucy R. Holt's portion of L.C.Aw. 281B to Ali to a $\frac{3}{4}$ " pipe;
4. Thence along the Halaakala Road, F.A.P. 5B, along the arc of a circular curve to the right with a radius of 2939.93 feet, the direct azimuth and distance of the sub chord being
 $193^{\circ} 29' 58''$ 67.79 feet to a $\frac{3}{4}$ " pipe;
5. $194^{\circ} 11'$ 348.62 feet along the Haleakala Roal, F.A.P. 5B, to the point of beginning, containing an area of 4.05 acres.

BEING the property conveyed to Lillian H. Corey by Bessie Hagopian by deed dated July 1, 1973, and recorded in the Bureau of Conveyances of the State of Hawaii in Liber 9808 at page 315;

TOGETHER WITH the improvements thereon and the rights, easements, privileges, and appurtenances thereunto belonging and appertaining.

END OF EXHIBIT "A"

APPENDIX E

SECURITY TITLE CORPORATION

**HEREBY CERTIFIES THAT THE ATTACHED
IS A TRUE COPY OF THE ORIGINAL DOCUMENT
FILED IN THE BUREAU OF CONVEYANCES
OF THE STATE OF HAWAII**

AS REGULAR SYSTEM DOCUMENT NO. 90-58048

ON APRIL 24, 1990 AT 8:01 AM

By: /s/[Illegible]

LAND COURT SYSTEM REGULAR SYSTEM

AFTER RECORDATION, RETURN BY MAIL () PICKUP (X)

Security Title Corporation

IVAN M. LUI-KWAN
PRESLEY W. PANG
2200 Pacific Tower
Bishop Square
1001 Bishop Street
Honolulu, Hawaii 96813
Tel. No. (808) 523-2500

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

Civil No. 52308

HERBERT H.K. LOUI and ALBERTA K.A. LOUI,
Plaintiffs,
vs.

LILLIAN HAGOPIAN COREY,
Defendant.

SATISFACTION OF JUDGMENT AND RELEASE
OF JUDGMENT LIEN

[Filed April 19, 1990]

COME NOW HERBERT H.K. LOUI and ALBERTA K.A. LOUI, Plaintiffs in the above-entitled matter, and hereby acknowledge full satisfaction of the judgment en-

tered herein on May 11, 1984, against Defendant LILIAN HAGOPIAN COREY; and do hereby release their judgment lien on the real property of said Defendant, said Judgment having been recorded in the Bureau of Conveyances of the State of Hawaii in Liber 17870, Page 319.

DATED: Honolulu, Hawaii, April 18th, 1990.

/s/ Herbert H.K. Loui
HERBERT H.K. LOUI
Plaintiff

/s/ Alberta K.A. Loui
ALBERTA K.A. LOUI
Plaintiff

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

On this 15th day of April, 1990, before me personally appeared HERBERT H. K. LOUI and ALBERTA K. A. LOUI, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

/s/ [Illegible]
Notary Public
State of Hawaii

My commission expires: 6/24/90

APPENDIX F

**UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF HAWAII**

Case No. 84-00371
(Chapter 11)

**ORDER GRANTING MOTION FOR AUTHORITY
TO SELL PROPERTY FREE AND CLEAR OF
LIENS AND OTHER INTERESTS; EXHIBIT A**

Hearing Date: February 12, 1990 at 1:30 p.m.

Assigned to The Honorable Martin Pence

IN RE LILLIAN HAGOPIAN COREY,
Debtor.

**ORDER GRANTING MOTION FOR AUTHORITY TO
SELL PROPERTY FREE AND CLEAR OF LIENS
AND OTHER INTERESTS**

[Filed Feb. 21, 1990]

On February 12, 1990, the Debtor's Motion for Authority to Sell Property Free and Clear of Liens and Other Interests, filed on February 1, 1990, came on for hearing. The hearing was attended by Walter R. Schoettle, Esq. on behalf of The Auna Foundation, Kualalani, Ltd., and Florence A. Ellis, Ivan M. Lui-Kwan, Esq. on behalf of creditors Herbert H.K. and Alberta K.A. Loui, and James N. Duca, Esq. on behalf of Lillian Hagopian Corey, the Debtor.

The Court having considered the pleadings and records on file herein and the argument of counsel, and good cause therefor appearing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

- 1) The actual and potential prejudice to the Debtor likely to result from any continuance of the hearing is

not offset by any credible showing that the continuance of the hearing is likely to generate a purchase of the property described in the Motion on terms more favorable to the estate and its creditors. No security to indemnify the Debtor from loss or damages resulting from any delay has been offered. The request for a continuance is denied.

2) Those persons who have filed objections to the Motion have been adjudicated to have no interest as creditors of this estate nor any ownership or other interest in the property described in the Motion. The judgments and decision on appeal to that effect have not been stayed.

3) The sale in question is contemplated by the plan of reorganization previously confirmed by this Court, and proceedings to authorize the sale of this property were commenced by Debtor prior to the confirmation of the plan. The sale is, in all material respects, consistent with the plan. Although the plan provides that the sale will be preceded by the Debtor's payment to the Loui creditors of \$500,000.00 in cash and the instant sale contemplates only a \$200,000.00 cash payment, that \$500,000.00 payment was solely for the benefit of the Loui creditors, who have the authority to waive that requirement and, under the terms of the instant purchase, have done so. The Debtor's cash payment to the Louis of \$200,000.00, rather than \$500,000.00, operates to the benefit of all creditors of the estate other than the Louis. The Motion does not involve any material modification of the plan.

4) Approval of the Motion is consistent with the letter and spirit of the decision of the Ninth Circuit Court of Appeals in *In re Ellis*, ___ F.2d ___ (9th Cir. 12/27/89) (slip. op. at 14728), which directs that this case is at an end.

5) This sale is authorized under 11 U.S.C. Section 363(f)(1), because non-bankruptcy law permits the sale

of the subject property free and clear of any interest of the objecting parties or persons claiming by, through or under them. It is also authorized under 11 U.S.C. Section 363(f)(4) because the interest of the objecting parties and persons claiming by, through or under them is in genuine dispute, to the extent that this dispute has not already been conclusively resolved in the Debtor's favor. Herbert H.K. and Alberta K.A. Loui have consented to the sale.

6) The proposed sale and settlement will result in a net benefit to the estate in excess of \$1,009,000.00, which is the approximate amount still owing by the Debtor to the Louis under the judgment and allowed secured claim in their favor. The payment of the Louis' claim is secured by liens on the subject property and all other real property assets of the estate, which will be satisfied by the sale. The sale is in the best interests of the estate and its creditors, and will relieve the Debtor of continuing liability for interest at the rate of approximately \$211.00/day.

For the foregoing reasons, LILLIAN HAGOPIAN COREY, as debtor-in-possession and in her individual capacity, is hereby authorized and directed to sell to Herbert H.K. and Alberta K.A. Loui the property described in the annexed Exhibit A, free and clear of all other interests, on the terms and conditions specified in the "Settlement and Purchase Agreement" of January 26, 1990.

DATED: Honolulu, Hawaii, Feb. 20, 1990.

/s/ [Illegible]

Judge of the Above-Entitled Court

In re LILLIAN HAGOPIAN COREY; Case No. 84-00371 (Chapter 11), Order Granting Motion for Authority to Sell Property Free and Clear of Liens and Other Interests; Exhibit A.

EXHIBIT A

ALL of that certain parcel of land situated on the Haleakala Road (Federal Aid Project 5B) at Omaopio, Kula, County of Maui, State of Hawaii, being a portion of L.C.Aw. 281B to Ali, and being more particularly described in File Plan 382 as follows:

LOT 2: BEGINNING at a $\frac{3}{4}$ " pipe at the northwest corner of Lot 2 and on the east side of Haleakala Road, F.A.P. 5B, the coordinates of which point referred to H.G.S. Trig. Station "Puu Pane" being 10493.0 feet south and 3064.5 feet east, and running by azimuths measured clockwise from true south:

1. $285^{\circ} 59'$ 438.47 feet along the Roman Catholic Mission's portion of L.C.Aw. 281B to Ali to a $\frac{3}{4}$ " pipe;
2. $8^{\circ} 46' 30''$ 359.46 feet along Lot 3 of L.C.A. 342 to a $\frac{3}{4}$ " pipe;
3. $98^{\circ} 45' 30''$ 473.45 feet along Lot 3, Lucy R. Holt's portion of L.C.Aw. 281B to Ali to a $\frac{3}{4}$ " pipe;
4. Thence along the Haleakala Road, F.A.P. 5B, along the arc of a circular curve to the right with a radius of 2939.93 feet, the direct azimuth and distance of the sub chord being
 $193^{\circ} 29' 58''$ 67.79 feet to a $\frac{3}{4}$ " pipe;
5. $194^{\circ} 11'$ 348.62 feet along the Haleakala Road, F.A.P. 5B, to the point of beginning, containing an area of 4.05 acres.

BEING the property conveyed to Lillian H. Corey by Bessie Hagopian by deed dated July 1, 1973, and recorded in the Bureau of Conveyances of the State of Hawaii in Liber 9808 at page 315;

TOGETHER WITH the improvements thereon and the rights, easement, privileges, and appurtenances, thereunto belonging and appertaining.

APPENDIX G

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

BK No. 84-00371
Chapter 11

IN RE LILLIAN HAGOPIAN COREY,
Debtor-Appellee,

LILLIAN HAGOPIAN COREY,
Plaintiff-Appellee,
vs.

KULALANI, LTD., *et al.,*
Defendants-Appellants.

RENEWED EX PARTE SUGGESTION OF RECUSAL
BY THE HONORABLE MARTIN PENCE

[Filed Nov. 4, 1988]

On August 19, 1988, the undersigned filed an ex parte suggestion in BK No. 84-0371 that the Honorable Martin Pence disqualify himself, pursuant to Sec. 455(a), 28 U.S. Code, because his partiality might reasonably be questioned from the record of *sua sponte* proceedings on the issue of ownership of Silversword Inn.

Without the benefit of transcript, the suggestion was based upon extraordinarily disparaging "findings" announced on June 24, 1988, at the conclusion of several days of hearings. Although a copy was ordered from the Ms. Brooke Iverson, court reporter, on June 25, 1988 (and

the original on July 25, 1988), the transcript was not available when the prior suggestion of recusal was filed on August 19, 1988, nor is it yet available.

At a hearing on August 24, 1988, the Court denied the recusal suggestion, as follows:

* * * As Mr. Ellis points out in his suggestion, he makes no affidavit. He simply quotes therein from my decision of recent date in this particular case some statements I made therein, the law is clear. Settled since 1966, even before that, in *U.S. versus Grinnell*, United States Supreme Court case and before that, *U.S. versus Berger* (phonetic), oh, that was many, many years ago, that any statements made by the judge based upon what has occurred before him in court, in other words, are not grounds for his recusal. Any statements must come from extra judicial sources.

Now, that same law has been applied in the Ninth Circuit, 1987 in *Hasbrouk versus Texaco*, 880 Fed Second, 1513 and *Hansen versus C.I.R.*, in the Ninth Circuit, 820 Fed Second, 1464 and right in this own court—did I say—yeah in this own court, Judge King applied it in, *In Re Manoa Finance Company, Inc.* and affirmed in 781 Fed Second, 1370.

This Court has had, this judge has had the same problem before me many, many times. The law is clear from the *Grinnell* and the *Berger* cases. The allegations of bias and prejudice must come from extra judicial sources. All the statements from which Mr. Ellis indicated in his suggestion that I recuse myself, came from judicial sources. The suggestion is denied. (RT, 8/24/88, pp. 1-2.)

The undersigned respectfully renews his suggestion that the Honorable Martin Pence disqualify himself, pursuant to Title 28, U.S. Code, Secs. 455(a) and/or 455(b)(1),

for the reasons that his impartiality might reasonably be questioned and/or he has a personal (extrajudicial) bias and prejudice concerning the undersigned.

This renewed suggestion is based upon transcripts of proceedings on estimation of claims (RT, 4/27/88, 4/28/88) and approval of the Chapter 11 liquidation plan (RT, 5/27/88).

Berger v. United States, 255 U.S. 22, 32-34, 41 S.Ct. 230, 65 L.Ed. 481 (1922) is the seminal case interpreting what is now Section 144, Title 28, U. S. Code. *United States v. Azhocar*, 581 F.2d 735, 738, (9th Cir. 1978).

Berger does not use the word "extrajudicial." Rather, at 31, the *Berger* court relies upon *Ex parte American Steel Barrel Co.*, 230 U.S. 35 as establishing,

* * * that the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case.

The Third Circuit, in *Johnson v. Trueblood*, 629 F.2d 287, 291 (3rd Cir. 1980) explains extrajudicial bias that disqualifies a judge from proceeding further in a case, as follows:

"Extrajudicial bias" refers to a bias that is not derived from the evidence or conduct of the parties that the judge observes in the course of proceedings. See *United States v. Grinnell Corp.*, 384 U.S. 563, 580-83, * * *

The undersigned is not a party to Adv. Pro. No. 85-0175 nor Adv. Pro. No. 72-391(3) & (4). He had not appeared before Judge Pence in either of said proceedings, except as an officer of certain defendants on a discovery motion.

The undersigned appeared as a party in interest before Judge Pence in BK No. 84-0371 for the first time on April 27 and 28, 1988, on the estimation of assigned

claims. Neither he nor the Debtor testified or otherwise presented any evidence in the course of those proceedings to support the *pretrial* determination on May 27, 1988, that the undersigned is a wheeler and dealer whose advice to the Debtor is the root cause of the LOUIS' judgment against her, which Judge Pence expressed as follows:

* * * You are a very intelligent woman. You are a well educated woman. And I notice over this time that you've been before me, due to your association with a husband who was a lawyer, *due to your association with Ellis, who is not a lawyer but who is a wheeler and dealer with a lot of legal ideas* that you have, yourself, acquired a lot of knowledge about law and legal obligations. * * * (RT, 5/27/88, p. 2-15, emphasis added.)

* * * [T]he judgment that you owe some \$700,000.00 because you couldn't deliver the property [Silversword Inn]. And the reason, as you know and I know, that you couldn't deliver the property was because Ellis had made a deal with you one way and you thought it mean that you owned the property, and he said "Oh, no." That he had the right to buy it back, and the Court of Appeals held that that constituted sort of a mortgage so that it would—document instead of a deed that you were getting. *This is all Ellis and his wheeling and dealing and you happen to be the sucker for it. I heard you say that you relied upon his advice and see where his advice put you. It put you into the Court here today with me telling you that you're stuck.* * * * (Id., p. 2-18, emphasis added.)

The "wheeler and dealer" bias against the undersigned, as expressed by Judge Pence in *ex parte* colloquy with the Debtor on May 27, 1988, is clearly "a bias that is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings."

Johnson v. Trueblood, supra. The bias is obviously personal (i.e., extrajudicial), even though expressed from the bench.

In *Connelly v. United States Dist. Court*, 191 F.2d 692 (9th Cir. 1951), at 696 and 697, the Ninth Circuit comments on the "solicitude" of Congress in providing for disqualification of judges by affidavit (Section 144), quoting and adding emphasis to *Berger* 255 U.S. at page 35, 41 S.Ct. at page 234:

* * * that the tribunals of the country shall *not only* be impartial in the controversies submitted to them but shall give *assurance* that they *are* impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment.

The Ninth Circuit Court continues, at 697:

It is not enough that the judge, despite his pre-determination of essential facts, may put them aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the "assurance" of fairness and impartiality. * * *

The cases cited by Judge Pence on August 24, 1988, and those cited *supra* relate primarily to Section 144, which places the burden of an aggrieved litigant to make a timely and sufficient affidavit.

Congress, in its solicitude that the tribunals of the country shall *not only* be impartial in the controversies submitted to them but shall give *assurance* that they *are* impartial, free from any "bias or prejudice" that might disturb the normal course of impartial judgment, in 1948 placed the burden of recusal upon the judiciary itself under the circumstances set forth in Section 455 of Title 28. The statute mandates, in pertinent part, as follows:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in

which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party * * *

Without specific reference to Section 455, the Sixth Circuit analogizes in *Knapp v. Kinsey*, 232 F.2d 458, 465, extrajudicial (i.e., personal) bias and prejudice manifest prior to trial with the manifestation of bias and prejudice in the course of judicial proceedings, as follows:

Bias or prejudice on the part of the judge may exhibit itself prior to the trial by acts or statements on his part. Or it may appear during the trial by reason of the actions of the judge in the conduct of the trial. If it is known to exist before the trial it furnishes the basis for disqualification of the judge to conduct the trial. Section 144, Title 28, U.S. Code. [quoting] This statutory provision is not directly applicable to proceedings wherein the claimed bias or prejudice appears during the course of the trial. However, there would seem to be a close analogy between bias and prejudice which would disqualify a judge from sitting in a judicial proceeding and the bias and prejudice appearing during the course of the proceedings which would render the judgment therein invalid. * * *

Since the undersigned was unaware of the pretrial bias and prejudice manifest in *ex parte* proceedings on May 27, 1988, he could not prepare a timely pretrial affidavit disqualifying Judge Pence pursuant to Section 144.

* * * When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties,

or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a *personal* bias and prejudice which renders invalid any resulting judgment in favor of the party so favored.
* * * (*Knapp v. Kinsey*, *supra*, at 466, emphasis added.)

Whether consciously or not, the Honorable Martin Pence has clearly indicated by all of the conduct described in the above quotation from *Knapp v. Kinsey*, a *personal* (*i.e.*, extrajudicial) bias and prejudice which mandates *sua sponte* recusal pursuant to Sections 455(a) and/or 455(b)(1), applying the rationale of Ninth Circuit and U.S. Supreme Court rulings on the earlier Section 144.

The Fifth Circuit, in *N.L.R.B. v. Phelps*, 136 F.2d 562, 563-64, is also in accord:

* * * [A] fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process * * * Nor will the fact that an examination of the record shows that there was evidence to support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings and no judgment based upon them may stand.

On the record presently available, partiality against the undersigned and in favor of the Debtor, and predisposition of the merits of the Silversword Inn ownership issue, first appeared in *ex parte* colloquy between the Debtor and Judge Pence on May 27, 1988.

This extrajudicial bias and prejudice is respectfully challenged by invoking the Congressional mandate of Section 455, one of the "checks and balances" in our constitutional system of government. The undersigned expresses his constitutional right to be relieved against continued bias and prejudice in these proceedings by respectfully *suggesting* the *sua sponte* recusal of the Honorable Martin Pence.

DATED: Honolulu, Hawaii, November 4, 1988.

Respectfully submitted,

/s/ William S. Ellis, Jr.
WILLIAM S. ELLIS, Jr.
Creditor-Appellant, *pro se*

Certificate of Service. I hereby certify service of a copy of this paper upon Helen B. Ryan, trustee, James M. Duca, Esq., and Walter R. Schoettle, Esq., by mail or delivery on November 4, 1988.

/s/ William S. Ellis, Jr.
WILLIAM S. ELLIS, Jr.

(4)
No. 89-1840

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

—
KULALANI, LTD., ET AL.,

Petitioners,

v.

LILLIAN HAGOPIAN COREY, ET AL.,

Respondents.

—
**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit**

—
REPLY TO BRIEF IN OPPOSITION

WALTER R. SCHOETTLE
Attorney at law
(Counsel of Record for Petitioners KULALANI, LTD., THE
AUNA FOUNDATION, and
FLORENCE A. ELLIS)

HELEN B. RYAN, TRUSTEE, *pro se*

WILLIAM S. ELLIS, JR., *pro se*

Suite 1012
1088 Bishop Street
P. O. Box 596
Honolulu, Hawaii 96809
Telephone: (808) 537-3514

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No. 89-1840

IN THE

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OCTOBER TERM, 1989

KULALANI, LTD., *et al.*

Petitioners,

v.

LILLIAN HAGOPIAN COREY, *et al.*

Respondents.

REPLY TO BRIEF IN OPPOSITION

STATUTES INVOLVED

11 U.S.C.S. § 363(m) provides:

“(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.”

ALLEGED INACCURACY IN THE PETITION

Respondents begin their Brief in Opposition with a section titled “Comments on Inaccuracies in Statement of Facts.” Br.Op., pp. 1-3. Only one “inaccuracy” is discussed. *Id.*, p. 1, l. 22 to p. 2., l. 14. Respondents complain of Petitioners’ allegedly misleading use of the term “*ex parte*” in reference to the two closed hearings, on September 2, 1987 and May 27, 1988.

The term “*ex parte*” was used by Petitioners in the sense of “*ex parte hearing*” as defined in *Black’s Law Dictionary*, 5th edition, page 517:

"Hearings in which the court or tribunal hears only one side of the controversy."

Even though the hearings were "on-the-record," "official" court proceedings, they were *ex parte* because only one party participated in the hearing.

STATEMENT OF THE CASE

While raising only this one alleged inaccuracy in their "Comments on Inaccuracies," Respondents made several statements of their own about the record which require response by Petitioners:

1. Br.Op., p. 2, ll. 2-3. Respondents state that attorney James Duca was a "court appointed" attorney. Actually, he was employed by COREY with approval of the court. C.R. 29.

2. Br.Op., p. 2., ll. 6-9. Respondents state that Petitioners were properly excluded from participation in the hearings of September 2, 1987 and May 27, 1988, because privileged and confidential matters were likely to be discussed. In fact, no privileged or confidential matters were discussed at either hearing. See Pet.App., pp. 187-231.

3. Br.Op., p. 2., ll. 11-12. Respondents state that Petitioners were properly excluded from participation in the hearings of September 2, 1987 and May 27, 1988. Petitioners do not complain of being excluded from the hearings, but rather of the improper discussion by the court in their absence of the activities of ELLIS and the status of the Silversword Inn.

4. Br.Op., p. 2, ll. 26-27. Respondents state that the argument that the Grinnell extrajudicial source rule should not be applied to § 455(a) was only alluded to by ELLIS, and not raised by the other Petitioners at all.

Actually, the precise argument was made by ELLIS in his *reply* brief in CA. NO. 88-15351, as follows:

"Sec. 455(b)(1) and 28 U.S.C., Sec. 144, are encrusted with layers of judicial gloss misconstruing 'extrajudicial.' Such is not the case with Sec. 455(a); an 'extrajudicial source' of bias or prejudice is not essential to disqualification." Reply Brief of Appellant William S. Ellis, Jr., CA. NO. 88-15351 & 88-15595, p. 22.

Petitioner RYAN joined in ELLIS' argument by filing a joint opening brief with him in CA. NO. 88-15350 and CA. NO. 88-15778, and a joint reply brief in CA. NO. 88-15778. ELLIS' opening brief in 88-15351 was incorporated by reference in the opening brief in CA. NO. 88-15778 and his reply brief in CA. NO. 88-15351 was incorporated by reference in his reply brief in CA. NO. 88-15778.

Petitioners KULALANI *et al.*, joined in ELLIS' argument in their reply brief in CA. NO. 88-15350 at page 3, and by joining in his opening brief in CA. NO. 88-15779¹.

As a final note, all Petitioners raised the argument that the *Grinnell* rule does not apply to § 455(a) in their suggestion for hearing *en banc*, as follows:

The points of law set forth in *Liljeberg* [*v.* *Health Service Acquisition Corp.*, 486 U.S. 847,

¹ While KULALANI *et al.*, joined in this opening brief, they expressed their separate opinion that the prejudice of Judge Pence was harmless error in the event the Judgment on the title issue were affirmed. This position was based on KULALANI'S position in CA. NO. 88-15351 that all of the findings of fact by Judge Pence were either irrelevant, immaterial or not supported on the record. The Court of Appeals did not address these points in its opinion. Instead, the Court of Appeals relied heavily on the trial court's findings of fact in its decision.

108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)], which was cited in Petitioners' brief, were apparently overlooked by this Court. *Liljeberg* does not cite *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), and does not turn on whether the alleged bias or prejudice is derived from an 'extrajudicial source.'" Petition for Rehearing and Suggestion of Rehearing En Banc, pp. 8-9.

5. Br.Op. p. 2, ll. 27-29. Respondents state that ELLIS claimed no interest in the Inn at the time that COREY filed her petition in bankruptcy, on August 6, 1984. The record is to the contrary. Appendix A, attached to the Brief in Opposition shows that ELLIS had filed an Answer to COREY's amended adversary complaint in Adv. No. 85-0185, on June 23, 1986. C.R. 18. This answer contains affirmative claims, in which ELLIS alleges in paragraph 12, p. 7, that he conveyed his interest in the Inn to KULALANI by warranty deed dated September 2, 1980, and had not yet received the full consideration for said conveyance. This claim was withdrawn by ELLIS *without prejudice*, on December 16, 1986. C.R. 43.

Thus, ELLIS had a claim to the Inn for an equitable lien securing the payment of the purchase price. *State by Pai v. Thom*, 58 Haw. 8, 17-18, 563 P.2d 982, 989 (1977). He further had an interest in establishing title of his grantee under warranty deed.

6. Br.Op. p. 2, ll. 33-34. Respondents state that ELLIS presented no evidence that he later acquired an interest in the Inn.

As ELLIS had withdrawn his claims *without prejudice*, it was not necessary to acquire an interest later. Nevertheless, he did, in fact, acquire additional interests in

the Inn subsequently. Appendix B to the Brief in Opposition shows that, on May 1, 1988, KULALANI, deeded the Inn to FLORENCE, subject to a fourth mortgage assigned to ELLIS on May 1, 1988 and a lease assigned to ELLIS on April 13, 1988.

7. Br.Op. p. 3, ll. 12-19. Respondents note that ELLIS did not formally seek leave to intervene in the trial on the title issue, and accuse him of "last-minute maneuvering to interject himself into a case from which he had been dismissed."

Actually, ELLIS did not "interject himself" into the controversy, Judge Pence dragged him in. As noted in the Petition, the title issue arose when RYAN objected to COREY's motion to sell the Inn pursuant to 11 U.S.C. § 363. See Pet. App. pp. 75-80. Judge Pence decided he needed to determine the title issue and *sua sponte* vacated the order dismissing the adversary proceedings in the ELLIS bankruptcy. *Id.* The title "trial" was conducted in a proceeding consolidating the ELLIS and COREY bankruptcies. Pet. App. p. 134. It was not necessary for ELLIS to intervene into the ELLIS adversary proceedings.

CONFLICT AMONG THE CIRCUITS

In the Brief in Opposition, Respondents argue there is no conflict among the Circuits because the First Circuit has held that "disqualification for personal bias or prejudice necessitates a showing that the alleged bias and prejudice be both personal and extrajudicial."

Petitioners have misapplied this holding to § 455(a). The First Circuit has repeatedly held that the "extrajudicial source" rule does *not* apply to § 455(a), as pointed out in the Petition.

The split among the circuits was discussed by Senior Circuit Judge John R. Brown, of the Fifth Circuit, sit-

ting by designation in the First Circuit in *United States v. Chantal*, 902 F.2d 1018 (1st Cir. 1990). In that case, the District Judge had refused to disqualify himself on the grounds that no "extrajudicial source" had been advanced in support of disqualification. On appeal, Judge Brown wrote:

"The trial judge in his memorandum briefly but pungently demonstrated that he was judging his appearance of impartiality by the wrong standard.

"With solid ground in the Fifth and Ninth Circuits, but not in the First the judge held that his remarks were immune from § 455(a) testing because, in his own words, Chantal's:

allegation of fact . . . clearly implies that the basis for the claim of bias or prejudice is information known to the judge because of his performance of judicial duties in defendant's prior case.

"To make it even clearer he added:

The information is not from an 'extra-judicial source' and is therefore not an adequate basis to force recusal [*citing Cooper, Grinnell Corp.*].

"The First Circuit, however, has repeatedly subscribed to what all commentators characterize as the correct view that, unlike challenges under 28 U.S.C. § 144, the source of the asserted bias/prejudice in a § 455(a) claim can originate explicitly in judicial proceedings." *United States v. Chantal, supra*, 902 F.2d at 1021-22. [Footnotes omitted.]

To further emphasize the split among the circuits, Judge Brown remarked in a footnote, as follows:

“10. Lest I commit myself to judicial harakiri I hastily acknowledge that at home I must and will follow the Fifth Circuit’s holdings, *see* note 6, *supra* which from the vantage of the First Circuit is wrong.” *Id.* at 1022.

The split of authority among the circuits is clear and should be resolved by this Court.

MOOTNESS OF APPEAL

Respondents argue that this appeal is rendered moot because the plan has been consummated and the property sold. They also cite 11 U.S.C. § 363(m).

Sec. 363(m) provides that a sale by a trustee during bankruptcy administration to a purchaser in good faith cannot be set aside on appeal from the order authorizing the sale unless a stay has been obtained. This statute does not apply to the instant case for a number of reasons. The most obvious reason is that the alleged “sale” was not made pursuant to subsection (b) or (c). *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1553 (11th Cir. 1988); see also *Matter of Texas Extrusion Corp.*, 844 F.2d 1142, 1165 (5th Cir. 1988). On its face the purported “sale” to the LOUIS was authorized under subsection 363(f). See Br.Op.App. F, p. 22a, ¶ 5.

Thus the appeal could be rendered moot only under the traditional analysis of finality of bankruptcy orders. See *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 194-5 (1977).

Under this analysis, there is no impediment to this Court setting aside the purported “sale” to the LOUIS.

The LOUIS are not purchasers in good faith without notice. *See In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 150-1 (1986). The LOUIS did not give any consideration other than offset of a portion of their judgment against COREY. Moreover, the LOUIS took the property with full knowledge of Petitioners' claim of title, having participated in this litigation throughout.

But even if the so-called sale to the LOUIS cannot be set aside by an appellate court, this appeal is not thereby rendered moot. The issue presented to this Court is whether or not Judge Pence should have disqualified himself. This issue is far from moot. Both the ELLIS and COREY bankruptcies are still pending. Judge Pence is still issuing orders. Indeed, he issued the order which Respondents now claim renders this appeal moot.² He continues to issue orders adverse to Petitioners' interests. Who knows what he may do in the future if he is not ordered to step aside?

Further, if Petitioners are successful herein, the title issue can be reopened since it is based on factual findings made by a judge who was not impartial. Even if the sale cannot be set aside, the title issue is not rendered moot. If Petitioners are the rightful owners of the property they are entitled to the proceeds of the sale, not COREY.

In addition, Judge Pence's rulings that Petitioners claims for damages against COREY are worthless were premised upon the assumption that they had no interest in the Silversword Inn.

² The order confirming the sale is set forth as Appendix F attached to the Brief in Opposition. On page 23a, the name of the judge issuing the order is omitted as being "Illegible." The judge who issued the order was, indeed, Judge Pence.

FAILURE TO RAISE ISSUES BELOW

Respondents claim that Petitioners failed to raise the issue that the *Grinnell* rule does not apply to § 455(a) in the courts below. Respondents cite *Equal Employment Opportunity Commission v. Federal Labor Relations Board*, 476 U.S. 19, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986) as authority that certiorari should be denied whenever an issue is not adequately raised below. The applicability of this case is questionable, because it was decided on the basis of a federal statute. 5 U.S.C. § 7123(c).

Whether, and if so at what point, an "issue" has been raised below clearly depends upon how broadly or narrowly the issue is defined. In the instant case, the "issue" of judicial disqualification was clearly raised below. Indeed, the opinion of the Court of Appeals states that Petitioners had made a "broadside attack on the impartiality of Judge Pence." Pet.App., p. 20.

As noted above, Petitioners specifically argued that the extrajudicial rule *does not apply* to § 455(a), in their reply briefs and in their suggestion for hearing *en banc*.

So the real question is not whether the issue was *raised* below, but rather whether it was *adequately* raised.

In addressing this question, it is not necessary to discuss the record in the trial court, since under *Liljeberg* it was not even necessary to raise the issue of judicial disqualification there. Clearly, Petitioners' motions and suggestions for disqualification of Judge Pence adequately raised the issue at the trial level. Moreover, Judge Pence himself cited the statutory provisions of 28 U.S.C. §§ 144 and 455 and the extrajudicial source rule of *Grinnell* in his various decisions

not to recuse himself. His decision was clearly based on the rule of law that nothing on the official record of court proceedings could be used by Petitioners to question his impartiality.

Petitioners submit that it was not necessary to raise the § 455(a) argument in the Court of Appeals either. The argument had been rejected by the Ninth Circuit in *United States v. Olander*, 584 F.2d 876, 882 (9th Cir. 1978), *vacated* 443 U.S. 914, 99 S.Ct. 3104, 61 L.Ed.2d 878 (1979) and that holding has been followed in a long line of cases since. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1045-6 (9th Cir. 1987), *aff'd* 496 U.S. ___, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990); *Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1341 (9th Cir. 1980); *United States v. Sibla*, 624 F.2d 864, 869 (9th Cir. 1980).

Under the doctrine of *stare decisis*, the panel who heard the appeal below was bound by these precedents and could not have ruled otherwise. Only the entire court sitting *en banc* had the authority to overrule *Olander*. *Charleston v. United States*, 444 F.2d 504, 506 (9th Cir.) *cert. denied* 404 U.S. 916, 92 S.Ct. 241, 30 L.Ed.2d 191 (1971).

Appellants raised the issue of the applicability of the *Grinnell* rule to § 455(a) in their suggestion for hearing *en banc*. It should not have been necessary to raise it earlier. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 118 L.Ed.2d 1094, *reh. den.* 389 U.S. 880, 88 S.Ct. 11, 19 L.Ed.2d 197 (1967).

In spite of this, as noted above, Petitioners *did* specifically raise the issue before the Court of Appeals panel. The panel clearly considered the argument and rejected it. By citing *Grinnell* to preclude consideration of the record as grounds for recusal, the opinion of

the Court of Appeals squarely raises the issue now presented to this court by Petitioners: does the *Grinnell* rule apply to § 455(a)?

CONCLUSION

Based on the foregoing arguments and authorities, Petitioners respectfully request that this Court grant the petition for certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

Dated: Honolulu, Hawaii, September 4, 1990.

Respectfully submitted,

Walter R. Schoettle
(Counsel of Record)

Helen B. Ryan, Trustee

William S. Ellis, Jr.